

Money for Nothing, Listings for Free: Constitutional Implications of Subjecting “For-Sale-By-Owner” Websites to Real Estate Broker Licensing Statutes

“The modern state owes and attempts to perform a duty to protect the public from those who seek . . . to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system. But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”¹

I. INTRODUCTION

Real estate agents are the principal facilitators in modern real estate transactions.² As prospective buyers and sellers become more technologically savvy and desirous of information, however, they increasingly turn to Internet-based services to search for or market available properties.³ “For-Sale-By-Owner” (FSBO) websites allow sellers to advertise or “list” properties in online databases that permit buyers to register to obtain property information.⁴ FSBO

1. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (distinguishing properly regulated practice of vocation from protected expression).

2. See Karen Janisch, *Field Guide to Quick Real Estate Statistics*, <http://www.realtor.org/libweb.nsf/pages/fg006> (last visited May 15, 2008) (compiling and posting National Association of REALTORS® statistics showing dominant presence of agents). As of 2006, 81% of home purchases were completed with broker services; 85% of home searches included information procured from real estate agent; 10% of homebuyers purchased directly from a builder; and only 5% were the result of prior owner and buyer negotiations (for-sale-by-owner). *Id.*

3. Noelle Knox, *It's Always “OPEN HOUSE” as Real Estate Goes Online*, USA TODAY, May 16, 2006, at 1A, available at http://www.usatoday.com/tech/news/2006-05-07-real-estate-online_x.htm (describing effect of increased Internet use on real estate agents' profession). Since 1995, use of the Internet for property searches increased from 2% to 77%. *Id.* Further, real estate website traffic increased at a higher rate of growth than other sectors employing the Internet. *Id.*; see also Janisch, *supra* note 2 (estimating 80% of prospective homebuyers researched Internet sources for home searches in 2006). Those opting to sell their property independent of a real estate agent, however, still employ traditional methods of advertising, such as yard signs, newspaper advertisements, and open houses; only 22% of for-sale-by-owner marketing took place online in 2006. See Janisch, *supra* note 2.

4. Institute for Justice, *Battling the Real Estate Establishment: New Hampshire's Free Speech Rights Not For Sale*, http://www.ij.org/first_amendment/nh_free_speech/background.html (last visited May 15, 2008) [hereinafter *Battling*] (defining FSBO website as “[I]nternet advertising service” resembling newspapers); see, e.g., ForSaleByOwner.com, <http://forsalebyowner.com> (last visited May 15, 2008) (providing search engine for listed properties); ISoldMyHouse.com, <http://www.isoldmyhouse.com> (last visited

websites offer low, flat-fee rates, in contrast to the percentage commissions typically sought by real estate agents.⁵

Though reduced closing costs are enticing to consumers, licensed agents take exception to the breadth of services offered by these websites.⁶ REALTOR® groups insist that the stringent legal and ethical standards to which licensed real estate brokers must adhere are routinely violated by FSBO websites.⁷ They contend that the personalized services and advice certain websites provide belie their purported indifference to the transactional outcome, and thus should comply with the statutory licensing requirements.⁸ In response, some websites protest that licensing statute definitions are overinclusive and the corresponding restrictions impermissibly interfere with their ability to communicate.⁹

May 15, 2008) (requiring registration before listing property or viewing property details); ZeroBrokerFees.com, <http://www.zerobrokerfees.com> (last visited May 15, 2008) (posting nationwide property photographs and descriptions).

5. See *Battling*, *supra* note 4 (suggesting commission and fee reductions result from website prevalence). Compare SHANE HAM & ROBERT D. ATKINSON, PROGRESSIVE POLICY INSTITUTE, MODERNIZING HOME BUYING: HOW IT CAN EMPOWER INDIVIDUALS, SLASH COSTS, AND TRANSFORM THE REAL ESTATE INDUSTRY 3 (2003), http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=140&subsecID=900055&contentID=251396 (estimating traditional broker fee or commission at 6% of sale price), with ForSaleByOwner.com, <http://forsalebyowner.com> (last visited May 15, 2008) (allowing listing until sold for \$199.00 flat fee), and ZeroBrokerFees.com, <http://zerobrokerfees.com> (last visited Jan. 22, 2008) (pricing listing featuring one photo for \$49.95).

6. See Knox, *supra* note 3 (quoting consumer who said that “by selling it ourselves, we could lower the price by \$50,000”); see also Tom Ramstack, *Real Estate Services For Sale by Owner*, WASH. TIMES (D.C.), June 4, 2005, at C10, available at 2005 WLNR 8967537 (contrasting customer testimonials praising do-it-yourself real estate transactions with broker warnings of hazards); Pat Taylor, *N.H.: Complaint Says Site Acts as Broker*, REALTOR® MAG. ONLINE, Sept. 21, 2004, <http://www.realtor.org/RMODaily.nsf/pages/News2004092101?OpenDocument> (citing complaint filed with New Hampshire Real Estate Commission that website breached licensing statute). The New Hampshire Association of REALTORS® filed a complaint against ISoldMyHouse.com alleging that the FSBO website operated as a real estate broker under the state’s licensing statute by listing properties for sale, assisting in negotiations, and accepting advance fees. Taylor, *supra*.

7. See *Licensing of Brokers and Salespersons*, 10A-6 REAL ESTATE BROKERAGE LAW & PRACT. § 6.02[1] (2006) [hereinafter *Licensing*] (noting licensing statutes vary by state yet supplying Model License Law covering broad range of activity). Most real estate licensing statutes’ definitions of “brokers” encompass such activities as listing property for sale, negotiating for purchase or sale of property, and assisting in the procurement of potential buyers. *Id.* To obtain licensure, a prospective broker must meet the minimum state standards of education and experience and must pass a licensing exam. See *id.* § 6.03; see also Taylor, *supra* note 6 (referencing NHAR’s desire that FSBO websites be sanctioned for unlicensed broker activity); National Association of REALTORS®, *How to Join NAR*, July 6, 2007, <http://www.realtor.org/realtororg.nsf/pages/HowtoJoin?OpenDocument> [hereinafter *How to Join*] (identifying NAR as country’s largest professional association with stringent standards). A REALTOR® is a professional involved in real estate transactions who is a member of the National Association of REALTORS®. *How to Join, supra*. As a REALTOR®, real estate agents are subject to a professional code of ethics in addition to statutory licensing requirements. *Id.*

8. See Taylor, *supra* note 6 (discussing filing of action by concerned brokers aware of potential harm to consumers). New Hampshire REALTORS® filed an action against a FSBO website alleging it was acting as an unlicensed real estate broker. *Id.*

9. See *Battling*, *supra* note 4 (declaring licensing statutes too onerous for websites principally in

The Institute for Justice (Institute), a self-described “libertarian public interest” law firm, seeks to excuse FSBO websites from statutory licensing requirements, claiming that such regulations are unconstitutional.¹⁰ In *ForSaleByOwner.com v. Zinnemann*,¹¹ the Institute argued that California’s licensing scheme affecting ForSaleByOwner.com (FSBO.com), a popular “Internet advertising service,” unconstitutionally impinged on the website’s First Amendment right to free speech and operated as a prior restraint on free speech.¹² Ultimately, the Institute prevailed on the argument that the statute denied the website equal protection under the law.¹³ The district court held that the statute’s exemption for newspapers created an arbitrary distinction resulting in unequal treatment.¹⁴

The Institute, in its determination to invalidate licensing regulations affecting FSBO websites, next targeted New Hampshire’s state licensing law.¹⁵ In *Skynet Corp. v. Slattery*,¹⁶ the Institute maintained that the New Hampshire Real Estate Practice Act (REPA) required its client to obtain licensure within the state in order to list New Hampshire properties on its website, ZeroBrokerFees.com (ZBF.com).¹⁷ The Institute challenged the statute’s constitutionality, alleging REPA provisions violated its client’s First Amendment rights.¹⁸ The district court, however, determined that the website fell within the statute’s exemption, thus circumventing analysis of the constitutional challenge.¹⁹ Despite the Institute’s fervent litigation of the issue,

advertising business).

10. See *Battling*, *supra* note 4 (attacking New Hampshire licensing statute on free speech and equal protection grounds); Institute for Justice, Institute Profile: Who We Are, <http://www.ij.org/profile/index.html> (last visited May 15, 2008) (describing Institute’s mission to “restore constitutional limits on the power of government”).

11. 347 F. Supp. 2d 868 (E.D. Cal. 2004).

12. *Id.* at 870-72; see also *Battling*, *supra* note 4 (claiming licensing statutes operate as prior restraint, deny free speech rights, and unjustly discriminate).

13. *Zinnemann*, 347 F. Supp. 2d at 873-76 (rejecting prior restraint argument); see also *id.* at 877-79 (holding in favor of website on equal protection grounds).

14. See *id.* at 877-78 (holding discrimination based on medium unjustifiable under strict-scrutiny review).

15. See generally *Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2008 WL 924531 (D.N.H. Mar. 31, 2008) (addressing FSBO website’s challenge to state’s brokerage statute provisions); *Battling*, *supra* note 4 (claiming New Hampshire statute violates website’s constitutional rights). The Institute for Justice predicts that the real estate industry will be revolutionized as a result of consumer freedom and Internet efficiency. *Battling*, *supra* note 4.

16. Civil No. 06-cv-218-JM, 2008 WL 924531 (D.N.H. Mar. 31, 2008).

17. *Id.* at *1-2 (summarizing plaintiff’s contention that REPA mandates licensure for FSBO websites); Institute for Justice, *Skynet Corporation d/b/a ZeroBrokerFees.com v. Slattery: May the government restrict the speech of real estate advertising websites?*, http://www.ij.org/first_amendment/nh_free_speech/index.html (last visited May 15, 2008) [hereinafter *Institute, ZeroBrokerFees.com*] (stating “Internet advertising companies” must become licensed broker to comply with REPA).

18. *Skynet*, 2008 WL 924531, at *1 (laying out plaintiff’s First Amendment challenge to REPA); *Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2007 WL 817638, at *2-3 (D.N.H. Mar. 13, 2007) (restating plaintiff’s allegation that REPA unconstitutionally prohibits FSBO website activities).

19. *Skynet*, 2008 WL 924531, at *11 (concluding website exempted from statutory definition of “broker,” forestalling discussion of constitutional challenge).

the applicability of the licensing statutes to FSBO websites and the constitutional validity of these statutes remain unresolved in most jurisdictions.²⁰

Many contend that real estate brokers are attempting to insulate themselves from competition.²¹ Nevertheless, licensing restrictions have long been a part of states' efforts to maintain professional standards and hold parties liable for misconduct.²² In determining the constitutionality of these statutes, courts must evaluate the purposes of the regulations and the statute's ability to effectuate these goals.²³ Because little case law exists on the subject, courts must consider analogous professional licensing schemes and publications through other mediums.²⁴

Part II.A of this Note introduces representative licensing statutes with accompanying definitions that may encompass FSBO website activities.²⁵ Part II.B explores existing case law, focusing on professional licensing requirements that allegedly violate First Amendment rights to free speech.²⁶ An explanation of courts' often conflicting analyses of full and commercial speech protections precedes a review of the more uniform judicial stance on unconstitutional prior restraints.²⁷ Part II.D continues with a discussion of equal protection principles, specifically the application of rational basis review where neither a suspect class nor a fundamental right is implicated.²⁸ Part II.E concludes with a

20. See generally Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000) (acknowledging several approaches to First Amendment review and noting their limitations). Only *Zinnemann*, decided by the United States District Court for the Eastern District of California, has rendered an opinion regarding the precise issue of subjecting FSBO websites to licensing statutes. See generally *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868 (E.D. Cal. 2004).

21. See J.F. Barron, *Business and Professional Licensing: California, A Representative Example*, 18 STAN. L. REV. 640, 640-44 (1966) (condemning licensing as a "'monopolistic restriction' on the operation of the market"); see also Kry, *supra* note 20, at 888 (contending motivation for licensure schemes includes economic self-interest). The Institute insists that REALTORS® are using their influence to prevent industry growth by inhibiting competition. *Battling*, *supra* note 4.

22. See *Brill v. State Real Estate Div. of the Dep't of Commerce*, 604 P.2d 113, 114-15 (Nev. 1979) (affording statutory deference where public protection drives legislative intent); see also Kry, *supra* note 20, at 955 (recognizing modern licensing laws date back to nineteenth century).

23. See *Santer v. Globe Publ'ns, Inc.*, 499 N.E.2d 389, 395 (Ohio Ct. App. 1985) (finding statute's furtherance of legitimate governmental purpose justified regulation under rational basis review); see also *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-770 (1976) (weighing regulation's effects on professionalism, skill, and expertise with potential public ignorance).

24. See *Lan Lan Wang v. Pataki*, 396 F. Supp. 2d 446, 456 (S.D.N.Y. 2005) (contrasting acts of FSBO advertising and online apartment information vending); see also *Zinnemann*, 347 F. Supp. 2d at 875 (analogizing investment advice publisher to FSBO website).

25. *Infra* Part II.A (providing examples of licensing statutes that potentially include FSBO website activity).

26. *Infra* Part II.B (describing state of law by analogizing various licensed professions).

27. *Infra* Part II.B (noting essentiality in distinguishing between commercial and non-commercial speech); *infra* Part II.C (describing rigid review when restriction identified as prior restraint).

28. *Infra* Part II.D (explaining standards of review including rational basis, intermediate scrutiny, and strict scrutiny).

description of services offered by two prominent FSBO websites: ISoldMyHouse.com and ZeroBrokerFees.com.²⁹

Part III analyzes statutory application and constitutionality using ISoldMyHouse.com and ZeroBrokerFees.com as representative examples of FSBO websites.³⁰ Part III then distinguishes each website based on its range of services.³¹ Part III argues that FSBO websites should submit to state law and acquire real estate broker's licenses when they expand their services beyond advertising.³² Finally, Part III asserts that while professional licensing may prove burdensome for some, the regulations are justifiable because they promote quality of service, discourage misconduct, and ensure accountability through the creation of a fiduciary duty.³³

II. HISTORY

A. Real Estate Broker Licensing Statutes: Construction and Application

Each state is responsible for instituting its own licensing laws.³⁴ Consequently, licensing statutes vary from state to state in their applicability to specified professions, as well as in their scope and breadth of regulation.³⁵ One effect of state discretion is divergent standards for real estate licensure and inconsistent consequences for violating these standards.³⁶

29. *Infra* Part II.E (detailing range of services offered by representative FSBO websites).

30. *Infra* Part III (utilizing representative websites for analysis).

31. *Infra* Part III (recognizing distinctions in website services and impact on need for licensure).

32. *Infra* Part III (stipulating point at which FSBO website service becomes act of brokerage).

33. *Infra* Part III (arguing benefits of licensure to public welfare outweigh burdens on actors in commerce).

34. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION 98 (2006) (distinguishing state licensing schemes from those adopted nationally in other countries); see also *Licensing*, *supra* note 7, § 6.02 (noting broad recognition of state's regulatory authority through licensing laws); America's Career InfoNet, Licensed Occupations, http://www.acinet.org/acinet/faq_info.asp?category=123&nodeid=102#108 (last visited May 15, 2008) (describing United States Department of Labor process for gathering state licensure information). States regulate occupations through several methods including licensure, certification, and registration. See Licensed Occupations, *supra*. The Council on Licensure, Enforcement, and Regulation (CLEAR) defines "licensure" as the most restrictive form of professional regulation, demanding compliance under threat of penalty. *Id.* Certification, in contrast, allows a compliant professional to gain recognition of competence but does not mandate members of the profession to obtain a certificate. *Id.* Registration, the least restrictive means of regulating occupations, only requires the provision of personal information and a small fee. *Id.*

35. See KLEINER, *supra* note 34, at 98-99 (arguing state-by-state structure of regulatory system creates variation in licensing standards). In 2000, California was ranked first in the nation for the number of licensed professions at 178. *Id.* at 100. Kansas held the lowest ranking with a mere forty-seven licensed occupations. *Id.* at 101.

36. See KLEINER, *supra* note 34, at 1-3 (describing statutory implementation and enforcement through state governmental agencies). States generally grant the power to enforce real estate licensing laws to an administrative agency, such as the Real Estate Commission. *Id.* at 3. The Real Estate Commission employs real estate professionals and independent parties who are empowered to settle disputes and take disciplinary actions for violations. *Id.* Because the state legislative systems are responsible for the creation of licensing

Most real estate licensing statutes provide that performing brokerage services, for a person other than oneself, will be considered an activity subject to regulation.³⁷ States differ, however, in their definitions of real estate brokers, classifications of activities attributable to those definitions, and exemptions from regulation.³⁸ Some states' real estate licensing statutes have recently become the basis of legal disputes.³⁹ The district court in *ForSaleByOwner.com v. Zinnemann* ruled that the FSBO website's activities fell under California's real estate licensing statute.⁴⁰ The statute in question required a broker's license for any individual seeking a fee for services rendered in connection with the purchase, sale, listing, or advertisement of property.⁴¹ Despite the impersonal and generalized nature of the services

requirements, professional standards may depend on the promotion of political objectives or result from the ability of professional groups to successfully lobby political support. *Id.* at 99.

37. See KLEINER, *supra* note 34, at 2 (setting forth primary categories of regulated activities).

38. See KLEINER, *supra* note 34, at 1-2 (providing model license law while describing potential variations in state law). The National Association of Real Estate License Law Officials' (NARELLO) Model License Law defines a broker as:

an individual or professional association while acting for another for commissions or other compensation or the promise thereof, or a licensee under this chapter, while acting in his own behalf who:

- (a) Sells, exchanges, purchases, rents, or leases real estate.
- (b) Offers to sell, exchange, purchase, rent or lease real estate.
- (c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.
- (d) Lists, offers, attempts or agrees to list real estate for sale, lease or exchange.
- (e) Auctions, offers, attempts or agrees to auction real estate.
- (f) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon.
- (g) Collects, offers, attempts or agrees to collect rent for the use of real estate.
- (h) Advertises or holds himself out as being engaged in the business of buying, selling, exchanging, renting or leasing real estate.
- (i) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, lease or rental of real estate.
- (j) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate.
- (k) Engages in the business of charging an advance fee

Licensing, supra note 7, § 6.02. The activities regulated under NARELLO's Model Act and its exemptions are narrow. *Id.* Many states, however, exempt lawyers from the confines of their licensing laws in recognition of the frequent overlapping of fiduciary duties in the legal context and in the context of real estate brokerage. *Id.*

39. See *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 870 (E.D. Cal. 2004) (addressing challenge of California licensing law); *In re ISoldMyHouse.com*, Complaint to New Hampshire Real Estate Commission, Aug. 19, 2004 [hereinafter *ISMH.com Complaint*] (contending operation of website not in compliance with New Hampshire licensing statute); Institute, *ZeroBrokerFees.com*, *supra* note 17 (contending New Hampshire law violates First Amendment rights of Massachusetts website).

40. See *Zinnemann*, 347 F. Supp. 2d at 871-72 (concluding website's activities covered by licensing statute and excluded from exemptions).

41. See CAL. BUS & PROF. CODE § 10130 (2003); see also *id.* § 10131.2. Section 10131 defined a real estate broker as:

provided by ForSaleByOwner.com, the court held that the broad statutory language encompassed the website's activities.⁴²

The New Hampshire brokerage definition under REPA is similarly broad and the accompanying licensing requirements are stringent.⁴³ In *Skynet Corp. v. Slattery*, Skynet insisted that REPA's definition of "broker" encompassed its business activity.⁴⁴ Skynet complained that REPA's provisions hindered its operations in New Hampshire due to its fear of prosecution for acting as a real

a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:
 (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property

Id. § 10131; *Zinnemann*, 347 F. Supp. 2d at 871 (quoting broad language of challenged statute). Section 10131.2 further stipulated that a broker is "a person who engages in the business of . . . charging . . . an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property . . ." CAL. BUS. & PROF. CODE § 10131.2; *see also Zinnemann*, 347 F. Supp. 2d at 871 (noting expansion of statutory applicability to advance fees and advertisements).

42. *Zinnemann*, 347 F. Supp. 2d at 871-72 (classifying website's activities as engaging in listing solicitations for advance fees). FSBO.com advertised properties for sale on its website for a flat fee. *Id.* at 870. The website also provided statistics of community information and generalized sample forms. *Id.* The website refrained from representing buyers or sellers, negotiating on either party's behalf, or participating in real estate transactions. *Id.* at 870-72. Its posting of advertisements in an online database, however, fell under the statute as a "listing" of real property. *Id.*

43. N.H. REV. STAT. ANN. § 331-A:2 (2007). The statute defines a broker as:

any person acting for another on commission or for other compensation . . . who:
 (a) Sells, exchanges, purchases, rents, or leases real estate.
 (b) Offers to sell, exchange, purchase, rent or lease real estate.
 (c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.
 (d) Lists, offers, attempts or agrees to list real estate for sale, lease or exchange.
 (e) Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements on real estate
 (g) Advertises or holds oneself out as being engaged in the business of buying, selling, exchanging, renting or leasing real estate.
 (h) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, lease, or rental of real estate.
 (i) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate.
 (j) Engages in the business of charging an advance fee . . . [for] listing in a publication or data base issued for such purpose, through referral of information concerning such real estate to brokers, or both.

Id.

44. *Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2007 WL 817638, at *3 (D.N.H. Mar. 13, 2007) (noting Skynet acknowledged its activities fell within statutory definition of "broker"); *see Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2008 WL 924531, at *2-3, *6 (D.N.H. Mar. 31, 2008) (reiterating Skynet's argument and noting Skynet denied its activities fell under the statutory exemption). Skynet claimed the following activities of ZBF.com fell under the purview of REPA's brokerage definition: "listing real estate properties for sale on the website, accepting an advance fee for the advertisement, and providing a means by which prospective buyers of property can be directed to sellers . . ." *Skynet*, 2007 WL 817638, at *3.

estate broker without a license.⁴⁵ Skynet's principal activity is advertising property for a fixed fee on its website, ForSaleByOwner.com.⁴⁶ In addition, FSBO.com provides mortgage calculators, forms, and links to related service providers, such as lenders, attorneys, appraisers, and others.⁴⁷

The district court performed a thorough statutory construction analysis and determined that the broker definition has two critical components: an individual must (1) act for another (2) for compensation.⁴⁸ The court surmised that Skynet, while satisfying REPA's *literal* definition, does not "act for another" within the *meaning* of the statute.⁴⁹ The court reasoned that Skynet merely "facilitat[es] the transmission of information" and "does not conduct its business as any sort of agency arrangement with its clientele."⁵⁰

Despite its conclusion as to Skynet's activities, the court ultimately based its holding on the second critical component of the brokerage definition: compensation.⁵¹ The court acknowledged that Skynet's collection of a fixed fee fell within the statutory definition of "advance fees."⁵² It held, however,

45. *Skynet*, 2008 WL 924531, at *2 (noting Skynet asserted reluctance to operate in New Hampshire due to REPA penalty provisions); see *Battling*, *supra* note 4 (suggesting legislature enacted restrictive licensing laws to benefit "real estate insiders" and inhibit innovative practices). According to the statute, a person or corporation that acts as a broker, but fails to comply with REPA's provisions, exposes himself or itself to criminal liability. N.H. REV. STAT. ANN. § 331-A:3 (2007) (proscribing "act[ing] as a real estate broker . . . without a license"); *id.* § 331-A:4 (providing unlicensed practice of real estate brokerage by individual or corporation constitutes misdemeanor or felony, respectively). The district court, while considering arguments as to standing, exhaustion, ripeness, and abstention, concluded that the existence of the ongoing administrative proceeding against ISoldMyHouse.com "produce[d] a credible threat of prosecution" for ZBF.com, as the websites engaged, at least in part, in similar activities. *Skynet*, 2007 WL 817638, at *5.

46. *Skynet*, 2008 WL 924531, at *2 (describing plaintiff as "online classified advertising and information service").

47. ZeroBrokerFees.com, <http://zerobrokerfees.com/> (last visited May 15, 2008). Accompanying a hotline for customer questions is ZBF.com's Broker Assist Program. ZeroBrokerFees.com, Broker Assist Program, <http://zerobrokerfees.com/brokerassist.html> (last visited May 15, 2008) [hereinafter ZBF.com Broker Assist] (describing ZBF.com's discounted broker referral program). The program purports to direct unsuccessful sellers to affiliated brokers who will work for discounted commissions. ZeroBrokerFees.com, Frequently Asked Questions, <http://zerobrokerfees.com/faq.html> (last visited Feb. 11, 2007) [hereinafter ZBF.com FAQs] (quoting 1% to 4% commissions for ZBF.com's affiliated brokers). Although unique to ZBF.com, the *Skynet* court did not include the program in its description of the website's services. See *Skynet*, 2008 WL 924531.

48. *Skynet*, 2008 WL 924531, at *7-9 (stressing extent of activities irrelevant if not performed on behalf of another for compensation).

49. *Id.* at *8 (interpreting statute to require broker to "act for another"). The court stressed that Skynet did not engage in an agency relationship with its customers, nor advance the interests of either buyer or seller. *Id.* (reading statute's language to "connote[] more of an agency relationship than merely a conduit service").

50. *Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2008 WL 924531, at *8 (D.N.H. Mar. 31, 2008) (noting Skynet does not represent itself as a real estate brokerage). The court highlighted the following statement posted on ZBF.com: "You sell your home. You keep the broker fee." *Id.* (internal quotations omitted) (noting ZBF.com distinguishes itself from brokers).

51. *Id.* at *9 (stating meaning of broker circumscribed by statutory meaning of advance fees).

52. *Id.* (acknowledging as undisputed that Skynet receives compensation in the form of advance fees). REPA defines "advance fees" as "any fees charged for services, including, without limitation, any fees charged for listing, advertising, or offering for sale or lease any real property." N.H. REV. STAT. ANN. § 331-A:2 (2007).

that Skynet's compensation also fell within the advance fee definition exemption for "fees paid solely for advertisement in a newspaper or other publication of general circulation."⁵³ The court read the exemption to include "mediums that transmit information like a newspaper," and determined that the Internet was such a medium.⁵⁴

The New Hampshire Association of REALTORS® (NHAR) is seeking to enforce REPA's licensing requirements against another unlicensed FSBO website, ISoldMyHouse.com (ISMH.com).⁵⁵ NHAR's complaint to the New Hampshire Real Estate Commission details the website's activities that it argues subject ISMH.com to the state's licensing laws, including the listing of properties on its online database.⁵⁶ In contrast with the websites in *Zinnemann* and *Skynet*, however, NHAR maintains that ISMH.com's activities go well beyond impersonal service; namely, that ISMH.com participates in real estate transactions by advising parties, directing buyers to affiliated mortgage brokers for financing, and screening prospective purchasers.⁵⁷ NHAR further argues

53. *Skynet*, 2008 WL 924531, at *11 (reading statutory exemption to include Skynet's business activities); see N.H. REV. STAT. ANN. § 331-A:2 (stipulating exemption of advertisement fees to certain types of publications).

54. *Skynet*, 2008 WL 924531, at *9 (focusing analysis on similarity of mediums). The court stated:

The medium must, like a newspaper, be in "general circulation," which, given its ordinary meaning, may be understood as readily available to the public, accessible to the whole population, or in the free flow of information. The internet is a medium by which information is disseminated, that is widely accessible to the population at large and involved in the free flow of information. I find, therefore, that it is a form of a "publication of general circulation," equivalent to a newspaper.

Id. The court also noted that newspapers, now available on the Internet, offer advertising services equivalent to those of ZBF.com. *Id.*

55. ISMH.com Complaint, *supra note 39*, at 1-2 (demanding sanctions against non-conforming website, including order to cease unlicensed activity). Although a decision by the New Hampshire Real Estate Commission will not be binding on the courts, the REALTOR® organization is seeking a favorable administrative ruling to bolster potential future litigation and discourage current and future unlicensed FSBO website activity. Interview with Paul Griffin, Executive Vice President, New Hampshire Association of REALTORS®, in Concord, N.H. (Dec. 15, 2006).

56. ISMH.com Complaint, *supra note 39*, at 5 (categorizing website conduct as statutory activity subject to regulation).

57. ISMH.com Complaint, *supra note 39*, at 2-5 (arguing ISMH.com's services include database listing, negotiation, and representation while disclaiming liability). The *Skynet* court acknowledged that the services allegedly offered by ISMH.com exceed those of ZBF.com, and the New Hampshire Real Estate Commission's actions are "consistent with its limited application of the exemption provision . . ." *Skynet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2008 WL 924531, at *11 (D.N.H. Mar. 31, 2008) (characterizing Skynet's reliance on ISMH.com investigation as "misplaced"). The court finds that ISMH.com

has participated in other aspects of the real estate transactions of its customer and has a financial interest in some of the sales, including the mortgages, of the properties on its website. ISMH also engages in giving advice regarding specific transactions to buyers and sellers, and holds itself out as offering services defined under REPA as broker services, but that purport to save customers money by eliminating brokers' fees from the real estate transaction.

Skynet Corp. v. Slattery, Civil No. 06-cv-218-JM, 2007 WL 817638, at *3 n.2 (D.N.H. Mar. 13, 2007)

that ISMH.com interferes with existing brokerage relationships by preventing communication between sellers and buyers who employ agents.⁵⁸

Many other states have instituted brokerage definitions and licensing requirements similar to those applicable in New Hampshire and California.⁵⁹ Licensing statutes' definitional terms are often vague, referencing the "facilitation" of purchases and sales of real estate or the charge of an advance fee for "promotion" of such a sale; broad terms will likely encompass some activity purported to fall under statutory regulation.⁶⁰ As a result, the determination of whether a FSBO website's activities fall under a licensing statute's definition of real estate brokerage is merely a preliminary matter.⁶¹ When the website's activity falls outside the statutory definition, the inquiry ends; when an administrative or legislative body determines that the activity is subject to brokerage laws, however, the statute may still be challenged on constitutional grounds.⁶²

(distinguishing services of ISMH.com from those of ZBF.com).

58. ISMH.com Complaint, *supra* note 39, at 4 (claiming ISMH.com purports to own listings and prevents communication between sellers and broker-represented buyers).

59. See *Licensing*, *supra* note 7, at § 6.02[1] (stating regulations broad once state institutes law). The NARELLO Model License Law, which is purported to be a typical licensing statute, includes a broad range of regulated activities similar to those regulated in California and New Hampshire. *Id.* The Model Law includes negotiating in purchases or sales of real estate, assisting in the procuring of prospects and charging an advance fee. *Id.*; see also *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 871 (E.D. Cal. 2004) (defining "advance fee" under California's broker licensing law). An "advance fee" may be defined as a fee charged for a "listing, advertisement or offer to sell or lease property, other than in a newspaper of general circulation, issued primarily for the purpose of promoting the sale . . . of . . . real estate . . ." *Zinnemann*, 347 F. Supp. 2d at 871. Almost half the states subject individuals to penalties for participating in even a single real estate transaction without a license under "single act" provisions. See *Licensing*, *supra* note 7, at § 6.02[2].

60. See, e.g., ARK. CODE ANN. § 17-42-103 (2001) (stating holding oneself out as broker considered brokerage); COLO. REV. STAT. § 12-61-101 (2006) (including seeking compensation for offering to sell or furnishing information regarding property availability); FLA. STAT. ANN. § 475.01 (1999) (including advertisement of rental property and assisting activities calculated to result in sale); GA. CODE ANN. § 43-40-30 (2004) (regulating collecting fee for sale promotion but excluding advertising fee); KY. REV. STAT. ANN. § 324.010 (2003) (including referring or offering to refer prospects for real estate purchase or sale); ME. REV. STAT. ANN. tit. 32, § 13198 (2005) (requiring licensure for finding prospects or facilitating purchase or sale); MASS. GEN. LAWS ANN. ch. 112, § 87PP (2001) (including purchase and sale, attempting to negotiate, and assisting prospect procurement); NEB. REV. STAT. § 81-885.03 (2003) (including promoting real estate sale through publication issued for referral purposes); N.Y. REAL PROP. § 440 (2004) (narrowly regulating individuals listing or negotiating for property sale); TEX. OCC. CODE § 1101.002 (2004) (defining brokerage to include aiding property location for sale or lease). The *Zinnemann* court held that § 10026 of the California Business and Professional Code, which defined "advance fee," was unconstitutional as applied. *Zinnemann*, 347 F. Supp. 2d at 877 (finding persuasive ISMH.com's argument that statute, as applied, "unconstitutionally discriminates by media type"); see CAL. BUS & PROF. CODE § 10026 (2003) (exempting "newspapers of general circulation from advance fee definition). The court reasoned that any distinction made between a FSBO website and a "newspaper of general circulation," which is exempted from the definition, was arbitrary. *Zinnemann*, 347 F. Supp. 2d at 877.

61. See generally *Zinnemann*, 347 F. Supp. 2d 868 (addressing applicability of statute before constitutionality issue).

62. *Id.* at 871-72 (classifying website activities in brokerage definition and noting exclusion from exceptions); see *Battling*, *supra* note 4 (conceding website activities fall under statute but protesting statute's constitutionality).

B. First Amendment Right to Free Speech: Full First Amendment Protection Versus Commercial Speech Protection

FSBO websites' primary objective of advertising homes for sale is an inherently expressive act; the website, as speaker, effectively communicates ideas to the viewer, its audience.⁶³ The First Amendment, while prohibiting undue interference with the freedoms of speech and the press, does not absolutely protect either right.⁶⁴ Instead, the government's interest in protecting its citizens allows it to limit First Amendment protection for certain categories of speech and publication.⁶⁵ The classification of speech corresponds with the particularized standard of review applied by the courts in analyzing a First Amendment infringement claim.⁶⁶

Several types of speech remain outside the protections of the First Amendment, including obscenity, defamation, and fighting words.⁶⁷ Where expression falls under one of these classifications, content-based restrictions are permissible.⁶⁸ These otherwise prohibited restrictions on content are justified

63. See *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972)) (acknowledging a right to "receive information and ideas"); see also *Battling*, *supra* note 4 (defending FSBO website activity as promoting "free flow of information").

64. U.S. CONST. amend. I, § 1 (protecting right to free speech). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*; see Philip J. Gordon, Comment, *Reasonable Fit Required Between Interests and Means When Regulating Commercial Speech*-*City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), 28 SUFFOLK U. L. REV. 183, 183-84 (1994) (stating First Amendment does not absolutely guarantee protections of expression). Regulation of purely commercial speech did not implicate the First Amendment until the Supreme Court, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), extended the constitutional protection to "speech that does no more than propose a commercial transaction." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

65. *Edge Broad.*, 509 U.S. at 426 (noting Constitution affords lesser protection to commercial speech); see P. CAMERON DEVORE & ROBERT D. SACK, *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* § 2, 2-1-3 (2001) (explaining courts' rationale for lesser protection of commercial speech).

66. DEVORE & SACK, *supra* note 65, § 2, 2-1-2 (classifying speech as commercial or non-commercial often determinative of constitutional review outcome).

67. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (acknowledging narrow classes of speech—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"—outside constitutional protection); see Allan Tananbaum, "New and Improved": *Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1821-27 (1988) (analyzing similar approaches to commercial speech and obscenity while recognizing latter's lack of constitutional protection); see also DEVORE & SACK, *supra* note 65, § 1, 1-6 to 7 (noting Supreme Court's exclusion of certain categories of expression from protection). False and deceptive advertising is speech that is misleading, fraudulent, or involves an unlawful activity. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980).

68. See, e.g., *Cent. Hudson Gas*, 447 U.S. at 563-64 (suppressing inaccurate commercial expression through government regulation permissible and desirable); *Friedman v. Rogers*, 440 U.S. 1, 8-10 (1979) (recognizing governmental imperative to ensure flow of truthful and legitimate information); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973) (asserting publisher of defamatory or illegal advertisements not afforded extended protection). In the case of false and deceptive

when speech or a publication poses a threat of public injury.⁶⁹

When the courts categorize a form of speech or publication as commercial in nature, that expression will only be afforded limited First Amendment protection.⁷⁰ Commercial speech may be defined as “expression related solely to the economic interests of the speaker and its audience.”⁷¹ Although commercial speech is not denied protection, like those forms of speech deemed threatening, courts have recognized a governmental imperative in regulating trade and commerce.⁷²

Consequently, a unique standard of review applies to commercial speech that balances the protection of freedom of expression against restrictions that serve valid governmental interests.⁷³ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁷⁴ the United States Supreme Court set forth a four-tiered test for evaluating the constitutionality of regulations targeting commercial speech.⁷⁵ According to the *Central Hudson Gas* test, a court must first consider whether the regulated expression falls within a category of protected speech.⁷⁶ Where a court finds the regulated speech

advertising, expressive activities that would otherwise garner protection under the First Amendment do not enjoy that protection. *Cent. Hudson Gas*, 447 U.S. at 563-64. Fraud or deception negates any rights to protection, allowing the government to regulate at its unfettered discretion. *Id.* at 563.

69. *Chaplinsky*, 315 U.S. at 572 (stating “social interest in order and morality” outweighs unprotected categories’ “slight social value as a step to truth”); see DEVORE & SACK, *supra* note 65, § 1, 1-2 (citing rise of consumer protection and social programs as prerequisite to commercial speech doctrine).

70. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980); *Ohralik v. Ohio State Bar Ass’n*, 463 U.S. 447, 456 (1978)) (acknowledging lesser protection afforded to commercial speech); see DEVORE & SACK, *supra* note 65, § 2, 2-1-3 (acknowledging differential treatment of commercial and non-commercial speech).

71. *Cent. Hudson Gas*, 447 U.S. at 561 (describing nature of commercial speech).

72. See Philip R. Stanton, Note, *A Bear Market for Freedom of Speech: The First Amendment and Regulation of Commodity Trading Advisers Under the Commodities Exchange Act*, 76 WASH. U. L.Q. 1121, 1128 (1998) (acknowledging government need to regulate commercial and professional activities). Some argue that the distinction between commercial and non-commercial speech is arbitrary and that commercial speech deserves full First Amendment protection. See DEVORE & SACK, *supra* note 65, § 1, 1-1-5. Proponents of the distinction insist that inherent differences exist that rationalize differential treatment. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (recognizing “‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech”); DEVORE & SACK, *supra* note 65, § 1, 1-4.

73. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (balancing considerations of expression regulated against governmental interest when evaluating commercial speech).

74. 447 U.S. 557 (1980).

75. *Id.* at 566-67 (applying four-step analysis to regulation of promotional advertising). The *Central Hudson Gas* test expanded the previously recognized commercial speech definition. *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 875 (E.D. Cal. 2004). Prior to *Central Hudson Gas*, the Supreme Court narrowly identified commercial speech as “speech which does no more than propose a commercial transaction.” *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted).

76. *Cent. Hudson Gas*, 447 U.S. at 563 (stipulating false or misleading communication or expression related to illegal acts falls outside review). If the court finds that the regulated expression falls within a category of speech not protected by the First Amendment, the inquiry ends and the governmental regulation

deserving of some protection, it will subject the governmental regulation or statute to a form of intermediate scrutiny.⁷⁷ For the regulation to stand, the governmental interest must be substantial; further, the regulation must directly advance that substantial governmental interest.⁷⁸ Finally, the court will uphold the government action where the regulation is narrowly tailored to achieve its purposes.⁷⁹

Although courts recognize and apply the *Central Hudson Gas* test to commercial speech, there is no definitive method for classifying speech as commercial.⁸⁰ In *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*,⁸¹ the United States Court of Appeals for the Seventh Circuit held that publication of impersonal investment advice did not constitute commercial speech.⁸² The plaintiff, Commodity Trend Service, Inc. (CTS), challenged a provision of the Commodity Exchange Act requiring registration with the Commodity Futures Trading Commission (CFTC) as a “commodity trading advisor.”⁸³ The court analyzed the content of the plaintiff’s publications and determined that no commercial transaction existed between CTS and a specific consumer.⁸⁴ Because the advertised publications did not “propose any commodity transaction,” the court held that requiring CTS to obtain licensure with the CFTC was unfairly burdensome.⁸⁵

stands. *Id.*

77. *Id.* at 565-72 (applying intermediate review of commercial speech regulation); see DEVORE & SACK, *supra* note 65, § 2, 2-3 (stating *Central Hudson Gas* test applies intermediate scrutiny to commercial speech deserving some protections).

78. *Cent. Hudson Gas*, 447 U.S. at 564-65 (stipulating need for substantial governmental interest to justify regulation).

79. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 565 (1980) (mandating narrow drawing where regulation proportional to governmental need).

80. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (acknowledging Court’s inability to clearly categorize commercial speech); see also DEVORE & SACK, *supra* note 65, § 2, 2-3 (recognizing complication of defining commercial speech). “Indeed, the Court has recognized that it is easier in some respects to define what commercial speech is *not*, than to state what it *is*.” DEVORE & SACK, *supra* note 65, at § 2, 2-3.

81. 149 F.3d 679 (7th Cir. 1998).

82. *Id.* at 685 (expressing court’s inability to conclude that publication of impersonal investment advice implicated commercial speech review).

83. *Id.* at 681 (summarizing requirements of statute and its applicability to investment advisors). The Commodity Exchange Act defines a “commodity trading advisor” as any person who “for compensation or profit, engages in the business of advising others, either directly or through publications . . . or electronic media, as to the value of or advisability of trading in commodity options.” *Id.* (internal quotations omitted).

84. See *id.* at 685-87 (noting performance of commodity trading performed by other parties). CTS’s publications included informational charts to aid in market and trading evaluation. *Id.* at 686. In addition, consumers could contact CTS for generalized trading advice via a telephone hotline. *Id.* The circuit court distinguished advertising for CTS’s publications, which is inherently commercial speech, from their content. *Id.* at 685. “An advertisement is a separate publication and does not strip the promoted publication of its First Amendment protection.” *Id.*

85. See *Commodity Trend Serv.*, 149 F.3d at 686-90 (detailing cost associated with CTS’s compliance with CFTC’s registration requirement).

In *Anderson v. Department of Real Estate*,⁸⁶ the plaintiff, Raymond Anderson, contested the applicability of California's real estate licensing requirements to his activities.⁸⁷ The plaintiff's business, Homefinders, offered subscriptions to a service providing a list of available rental properties.⁸⁸ The Department of Real Estate concluded that Homefinders acted as an advance fee rental agent, which required the maintenance of an active real estate broker's license.⁸⁹ As a result of its findings, the Department took administrative action by revoking the plaintiff's already inactive real estate license.⁹⁰ In analyzing the constitutionality of the regulatory scheme, the California Court of Appeal categorized the plaintiff's activities as commercial speech.⁹¹ The appellate court ultimately determined that the licensing requirements were overly broad in their inclusion of advance fee rental agents.⁹²

Similarly, the district court in *Lan Lan Wang v. Pataki*⁹³ considered the plaintiff's claim that the state's licensing law placed impermissible restrictions on commercial speech.⁹⁴ Under the Apartment Information Vendor (AIV) law, any person who "furnishes information concerning the location and availability of real property" had to obtain licensure from the New York Secretary of State.⁹⁵ The court applied the *Central Hudson Gas* test and held that the AIV law satisfied all of the elements.⁹⁶

Because the courts lack a cohesive method for distinguishing commercial speech from non-commercial speech, communication intended to result in economic benefit is not definitively commercial.⁹⁷ Non-commercial speech is

86. 93 Cal. App. 3d 696 (Cal. Ct. App. 1979).

87. *See id.* at 699 (challenging Department of Real Estate's revocation of plaintiff's real estate license).

88. *Id.* (describing Homefinders' method of obtaining information from landlords and newspaper advertising). Those consumers who wanted access to Homefinders' residential property information paid a twenty-five to thirty dollar fee. *Id.* The provision of the rental property lists resulted in limited success for Homefinders' customers; few sales resulted from the provision of the lists. *Id.* at 699-700.

89. *See id.* (defining "real estate broker" as person collecting fee for promotion of property sale or lease).

90. *Anderson*, 93 Cal. App. 3d at 700 (recounting license revocation as well as disciplinary actions against plaintiff).

91. *Id.* at 701-02 (focusing analysis on validity of real estate licensing requirements under commercial speech review).

92. *Anderson v. Dep't of Real Estate*, 93 Cal. App. 3d 696, 705 (Cal. Ct. App. 1979).

93. 396 F. Supp. 2d 446 (S.D.N.Y. 2005).

94. *See id.* at 456 (outlining plaintiff's contention that Apartment Information Vendor law violates freedom of commercial speech).

95. *Id.* at 452-53 (explaining state regulation as means to prevent fraudulent advertising and breaches of contract).

96. *Id.* at 456-57 (detailing justifications for the AIV law and its connection to substantial state interests). The court stressed that the purpose of the AIV law was to protect consumers; the licensing requirement ensures reputability of vendors and prohibits non-refundable fees for inaccurate information. *Id.* Because the law did not prohibit vendors from charging fees for property information, but merely required licensing for quality assurance, the court held that the AIV law was narrowly tailored to effectuate the state's interests in consumer protection. *Id.* at 457.

97. *See DEVORE & SACK, supra* note 65, § 2, 2-3 (stressing commercial speech more than expression resulting from economic transaction).

afforded greater protection because there is a societal interest in preserving and promoting the free flow of ideas.⁹⁸ This advancement of communication does not preclude regulation entirely.⁹⁹ Instead, the courts apply a strict scrutiny standard of review to the challenged law.¹⁰⁰

Under this standard of review, the government may regulate the content of speech where the regulation is necessary to serve a compelling state interest.¹⁰¹ Further, the regulation must be narrowly drawn to achieve that end.¹⁰² This stringent standard of review ensures that the government may not interfere with the distribution of information without substantial justification.¹⁰³

In *Zinnemann*, the California district court allowed FSBO website activity the benefit of full First Amendment protection.¹⁰⁴ The website, FSBO.com, listed sellers' properties in an online database, which prospective purchasers could initially search without paying a fee.¹⁰⁵ Although FSBO.com asserted that the state's attempted enforcement of real estate broker licensing requirements intruded on its commercial speech rights, the court held that commercial speech was not implicated.¹⁰⁶ Because FSBO.com did not "propose a commercial transaction between FSBO and its customers," the court refused to recognize the website's activities as commercial speech.¹⁰⁷ Instead, the court afforded full First Amendment protection to the website and performed strict scrutiny review.¹⁰⁸

98. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 592 (1980) (identifying purpose of First Amendment to protect distribution of information).

99. *Id.* at 592-93 (stating imperfections in "marketplace of ideas" exists requiring government intervention).

100. See DEVORE & SACK, *supra* note 65, § 2, 2-1-2 (stipulating restrictions on speech given full First Amendment protection permissible provided strict-scrutiny review passed).

101. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (applying strict-scrutiny review where publication entitled to full First Amendment protections).

102. *Id.* (determining overinclusive regulation does not meet narrow-tailoring requirement).

103. *Id.* at 123 (stating government failure to narrowly tailor regulation contrary to First Amendment principles).

104. See *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 876 (E.D. Cal. 2004) (classifying FSBO website activity as non-commercial in nature).

105. *Id.* at 870-71 (describing FSBO.com services).

106. *Id.* at 875-76 (analyzing applicability of commercial speech review as preliminary matter). The *Zinnemann* court relied on *Taucher v. Born*, in which the Commodity Exchange Acts' registration requirements were once again challenged. See *id.* (noting *Taucher* held general advice in "impersonal form" not commercial speech); see also *Taucher v. Born*, 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999) (explaining standard for determining commercial speech). "The fact that the publications at issue in *Taucher* included advertising materials did not render them commercial speech, with the Court emphasizing that the substance of the publications was not commercial since they proposed no commercial transaction directly between the publishers and any prospective customers." *Zinnemann*, 347 F. Supp. 2d at 875 (emphasis added).

107. *Zinnemann*, 347 F. Supp. 2d at 876 (citing impersonal nature of FSBO.com's range of services in holding lack of commercial speech).

108. *Id.* at 876-77 (finding commercial speech not implicated and affording website full First Amendment protection). The court, having determined that the statute discriminated based on media type, rejected rational basis in favor of strict-scrutiny review. *Id.* at 878; see *Pitt News v. Pappert*, 379 F.3d 96, 110-11 (3d Cir. 2004) (requiring strict-scrutiny review to overcome presumption of unconstitutionality for laws targeting narrow

C. First Amendment Right to Free Speech: Prior Restraints

A claimant may invoke First Amendment protection to invalidate a statute that operates as a prior restraint on free speech.¹⁰⁹ A prior restraint is legislation requiring an individual or entity to receive governmental permission prior to communication.¹¹⁰ While the courts are careful to protect individuals from censorship, they will not always find a prior restraint on free speech impermissible; there is, however, a strong presumption against a prior restraint's validity.¹¹¹ A court will deem a prior restraint impermissible when the restrictions upon which approval is conditioned are directed at speech or expression.¹¹²

Courts evaluating whether a regulation operates as an improper prior restraint on free speech must first determine that the speech restricted is otherwise entitled to full First Amendment protection.¹¹³ Prior restraints on commercial speech are permissible; therefore, a determination that the regulated speech is commercial speech may end the analysis.¹¹⁴ A statute operating as a prior restraint seeks "to regulate spoken words or patently expressive or communicative conduct" and does not have "an amorphous 'nexus' to expression."¹¹⁵ If classified as a prior restraint, to survive judicial

media segment).

109. *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1137 (9th Cir. 2004) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)) (classifying content regulations as prior restraints absent time limits and expedited review). The *Barter Fair* court recognized a distinction between regulations targeting content and those laws that are content-neutral. *Id.* In this case, the challenged statute, the Oregon Mass Gathering Act, regulated large overnight gatherings. *Id.* at 1135. Because the legislation applied to all gatherings regardless of purpose, the court found that the act was content-neutral. *Id.* at 1137. Content-neutrality excuses the government from providing procedural safeguards, such as time restraints and prompt judicial review to sustain its law; it does not, however, entitle the government to unbridled regulation of speech. *Id.* at 1138.

110. *See Taucher*, 53 F. Supp. 2d at 481 (defining prior restraint as regulation requiring advance approval from executive official); *see also Battling*, *supra* note 4 (stating presumptive unconstitutionality for prior restraints as infringement of First Amendment rights).

111. *See generally* *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (recognizing presumption against validity where regulation restricts communicative activities).

112. *See Barter Fair*, 372 F.3d at 1135 (prohibiting prior restraints where close nexus between speech and expression exists).

113. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 32-33 (2000) (explaining inapplicability of prior restraint argument to commercial speech regulation).

114. Post, *supra* note 113, at 32-33 (analyzing Supreme Court's refusal to protect commercial speech from prior restraints). The Supreme Court suggests that the presumption of invalidity is applicable only to non-commercial speech, and that prior restraints may be a valid method of regulating commercial speech. *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 571 (1980); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976)).

115. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 778 (1988) (holding the subjection of free speech to suspect licensing requirements impermissible). In *City of Lakewood*, the Court used the dissent's analogy between newspapers and soda vendors to clarify the difference between communicative and non-communicative conduct. *Id.* at 761. The Court explained that "[n]ewspapers are in the business of expression, while soda vendors are in the business of selling soft drinks." *Id.* Therefore, regulation of a vendor's speech or publication, made to promote its business activity, does not threaten censorship; instead, government regulation would likely be based on "neutral criteria" as opposed to content or viewpoint. *Id.* In *Barter Fair*, the court

review, the regulation must be narrowly tailored to accomplish a compelling governmental interest.¹¹⁶ A special threat or harm must exist to justify preventing expression.¹¹⁷

Accompanying its commercial speech analysis, the *Pataki* court addressed the plaintiff's allegations that the AIV law's licensing requirements constituted an unconstitutional prior restraint.¹¹⁸ In rejecting the plaintiff's prior restraint argument, the district court reasoned that the plaintiff's ability to communicate was not suppressed.¹¹⁹ The plaintiff merely suffered license revocation for failure to comply with state law.¹²⁰ The court expressed caution in validating a prior restraint claim in this context, as "any adverse action taken based on a person's unlicensed practice of a profession would be transformed into a 'prior restraint.'"¹²¹

The court in *Zinnemann* likewise held real estate licensing requirements did not operate as a prior restraint of speech.¹²² The activities of the FSBO website, such as listing properties and maintaining a database of available properties, held too amorphous a connection to actions associated with communication.¹²³ The court recognized that licensing requirements constitute prior restraints when they target the "exercise of First Amendment freedoms."¹²⁴

held that targeting mass gatherings was not a presumptively impermissible prior restraint. *Barter Fair*, 372 F.3d at 1137-38. Although general regulation of gatherings could result in restrictions on more expressive gatherings such as large-scale demonstrations and religious ceremonies, the court held that the government's justifications were sufficient. *Id.* (referencing Human Resource Department's need to address water, sewer, health, and safety issues).

116. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988) (demanding well-conceived and narrowly-drawn regulation for survival when acting as prior restraint).

117. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (stipulating particularized threat to speech suggests censorship and triggers strict scrutiny).

118. *Lan Lan Wang v. Pataki*, 396 F. Supp. 2d 446, 454-57 (S.D.N.Y. 2005) (acknowledging but dismissing plaintiff's cause of action based on prior restraint theory).

119. *Id.* at 455 (stating license revoked due to untrustworthiness, not for purposes of speech suppression).

120. *Id.* (defining prior restraint as governmental, content-based speech suppression before communication). "Here, the Secretary has not suppressed speech before it is communicated but rather revoked Wang's real estate broker's license because her unlicensed operation of an AIV demonstrated untrustworthiness." *Id.*

121. *Id.* (rejecting plaintiff's theory for fear of adverse effects on government's ability to regulate). The court noted that the state has the right to regulate professions within its borders, justified by a duty to protect its consumers from disreputable individuals masquerading as professionals. *Id.* at 455-57. Because of these justifications, obligating the government to overcome a presumption of invalidity would be counterproductive. *Id.* at 455.

122. *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 873-74 (E.D. Cal. 2004) (dismissing plaintiff's argument that licensing requirements impinge on free speech rights).

123. *Id.* at 874 (distinguishing FSBO website activity from "patently expressive or communicative conduct"). "At most, the real estate licensing statutes challenged here have only an attenuated and indirect connection with expression . . ." *Id.*

124. *Id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 777 (1988)) (indicating that subjecting professional activities to licensing requirements does not infringe on the ability to communicate).

D. Fourteenth Amendment Right to Equal Protection Under the Law

The purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent discriminatory state action.¹²⁵ The Supreme Court has developed three standards of review—rational basis, intermediate scrutiny, and strict scrutiny—each of which is increasingly rigid.¹²⁶ To ascertain the applicable standard of review, the court must identify the persons or activities subject to the allegedly discriminatory regulation.¹²⁷

The least exacting method for reviewing a statute is the rational basis test.¹²⁸ Under this standard, a court will uphold a regulation where the state action is rationally related to a legitimate government interest.¹²⁹ Because the regulation affects neither a suspect class—a group particularly vulnerable to unfair treatment—nor a fundamental right, the threshold for providing a sufficiently legitimate purpose is fairly low.¹³⁰

In *Lawline v. American Bar Association*,¹³¹ the United States Court of Appeals for the Seventh Circuit considered whether rules forbidding lawyers “from assisting laypersons in the unauthorized practice of law” violated the Fourteenth Amendment.¹³² The court was skeptical of the plaintiff’s claim that the rules violated Equal Protection principles.¹³³ Assurance that the public would be protected from incompetent and disingenuous laypersons attempting to practice law satisfied the rational basis justification requirement.¹³⁴

In contrast, intermediate scrutiny requires that the state action have a substantial relationship with an important government interest.¹³⁵ The courts apply this standard of review to those categories of individuals and entities

125. U.S. CONST. amend. XIV, § 1 (guaranteeing right to equal protection). The Fourteenth Amendment prescribes, in part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

126. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 272-73, 324-48 (1993) (describing standards of review under Fourteenth Amendment and providing exemplary cases).

127. *Id.* (explaining classifications of review standards).

128. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 475 (4th ed. 2001) (identifying rational basis review as “low level” in contrast to strict scrutiny).

129. *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1385 (1992) (stating legitimate state interest justifies regulation where rationally related).

130. *Id.* (rational basis review applied where no suspect class or fundamental right implicated).

131. 956 F.2d 1378 (1992).

132. *See id.* at 1381 (considering validity of disciplinary rules proposed by ABA and adopted by jurisdiction). The legal ethics rules also forbade attorneys from creating partnerships with laypersons for the purpose of practicing law. *Id.* at 1381-82.

133. *Id.* at 1385-86 (finding adequate justification for requiring regulated law practice).

134. *Id.* at 1385 (asserting that prohibiting untrained and unlicensed persons from practicing law protects consumers). The court stressed the importance of attorney autonomy, unaffected and unhampered by extraneous economic incentives. *See id.* In particular, “[t]he partnership rule limitation promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law.” *Id.*

135. *See FARBER ET AL., supra* note 126, at 337-48 (laying out requirements for survival of intermediate standard of review).

determined to need heightened protection.¹³⁶

Strict scrutiny is the most stringent standard for reviewing differential regulation.¹³⁷ In order to survive court scrutiny, the state action must be necessary to serve a compelling state interest.¹³⁸ Further, the regulation must be narrowly drawn to achieve those goals.¹³⁹ The court will automatically apply this standard to regulations involving suspect classes or fundamental rights.¹⁴⁰

Although the defendants in *Zinnemann* stressed that the contested licensing laws affected neither a fundamental interest nor a suspect class, the court disagreed and applied the strict scrutiny standard of review because the licensing laws affected fundamental First Amendment rights.¹⁴¹ In this case, FSBO.com claimed that its activities were equivalent to those of newspaper and magazine publishers that feature real estate advertisements, and they should therefore not be subjected to real estate licensing requirements.¹⁴² The court agreed that FSBO.com's online database was analogous to publications and websites of generally circulated newspapers, which were exempted from the state's licensing requirements.¹⁴³

Recognizing that any distinction between online publications and newspapers of general circulation was wholly arbitrary, the court determined that the state law discriminated based on media type.¹⁴⁴ A law that discriminates against a narrow segment of the media is presumptively unconstitutional, and such a presumption may only be overcome by a showing of a compelling governmental interest.¹⁴⁵ The court could not find a compelling state interest to justify the distinction and held the statute unconstitutional as applied to FSBO.com.¹⁴⁶

136. See FARBER ET AL., *supra* note 126, at 337-48 (recognizing court's heightened review of gender-based discriminatory legislation).

137. See STONE ET AL., *supra* note 128, at 499 (exploring regulated categories afforded strictest review).

138. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (requiring state assertion of compelling interest to counterbalance regulatory effect).

139. *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 879 (E.D. Cal. 2004) (holding discriminatory statute invalid where government failed to establish regulation narrowly tailored).

140. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969) (ruling regulation of fundamental right to interstate travel requires strict scrutiny); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding strict scrutiny applies when regulation based on suspect classes such as race or national origin).

141. See *Zinnemann*, 347 F. Supp. 2d at 878-79 (requiring compelling state interest as justification for state real estate licensure).

142. *Id.* at 877 (contending exemption should cover FSBO websites).

143. *Id.* (differentiating between media types impermissible where similarly published and no compelling state interest).

144. *Id.* at 878 (stating "advance fee" definition in § 10026 of the California Business and Professional Code discriminates "between particular segments of the media").

145. *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 878 (E.D. Cal. 2004) (citing *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004)) (disallowing use of rational basis test due to media type discrimination).

146. *Id.* (recognizing distinctions between newspapers and websites insufficient to justify different regulation of websites). The court considered the legislative history of the statute that afforded credibility to

E. ISoldMyHouse.com and ZeroBrokerFees.com: Varying Range of Services Offered by FSBO Websites

In analyzing the constitutional implications of subjecting FSBO websites to real estate brokerage laws, it is necessary to acknowledge the varying range of services offered by each website individually.¹⁴⁷ Further, because a website operator may alter its content at any time, analysis must be limited to a fixed period of time.¹⁴⁸

ISoldMyHouse.com, a FSBO website currently embroiled in a dispute with the NHAR, boasts “over 100,000 unique” visitors to its site each month and “over four million hits” each day.¹⁴⁹ At present, the website requires completion of a registration form with both personal and property information.¹⁵⁰ The website also provides suggestions to sellers for home valuation marketing.¹⁵¹ Potential sellers ultimately decide the price at which they will sell their property, in addition to posting a description and photographs of the property.¹⁵² ISMH.com proclaims that it will screen prospective purchasers seeking property information.¹⁵³ The website also

newspapers. *Id.* The court, however, was unwilling to deny FSBO.com the same presumption of credibility merely because it conducted its activities online. *Id.* at 876-77. The court acknowledged the stringent standards to which real estate brokers are held, as well as the costs associated with obtaining licensure; further, the court refused to subject an online advertiser to the standards of a real estate professional. *Id.* at 878.

147. Interview with Paul Griffin, Executive Vice President, New Hampshire Association of REALTORS®, in Concord, N.H. (Dec. 15, 2006) (acknowledging NHAR’s complaint isolated one website during series of dates).

148. *Id.* (noting NHAR’s complaint based on services offered and rendered during specific, stipulated time period). Executive Vice President Griffin stressed that ISMH.com’s website could change before NHAR’s claim is addressed by the Commission. *Id.* The website’s changing façade and services do not render the claim redundant; instead, a favorable decision would likely act as a deterrent to future violations as well as offer precedential value in case of future litigation. *Id.*

149. See ISoldMyHouse.com, Marketing Your Home, <http://isoldmyhouse.com/pages/selling-your-own-house.html> (last visited May 15, 2008) [hereinafter Marketing] (reporting high volume of website hits); see also ISoldMyHouse.com, Frequently Asked Questions, <http://isoldmyhouse.com/pages/FAQ.html> (last visited May 15, 2008) [hereinafter ISMH.com FAQs] (addressing general questions regarding listing and viewing process); ISMH.com Complaint, *supra* note 39 (detailing complaint filed against ISMH.com). ISMH.com claims to be amongst the top ten FSBO websites in the nation. See Marketing, *supra*.

150. See ISMH.com FAQs, *supra* note 149 (requiring completion of registration prior to posting advertisement).

151. See Marketing, *supra* note 149 (providing tips for preparing and marketing home for sale). The company offers “For Sale” signs as well as access to REALTOR.com and the Multiple Listing Service; it also advertises a money-back guarantee. Flyer, *ISoldMyHouse.com*, Vol. M-NHA-1406.

152. See ISMH.com FAQs, *supra* note 149 (explaining sales process and encouraging careful valuation and photograph choice). ISMH.com’s property valuation services range from \$9.90 to \$29.95. See ElectronicAppraiser.com, <http://www.electronicappraiser.com/selectproducts.cfm?subid=5537424&CFID=31581006&CFTOKEN=4d801938ef11d1-B4B1B1BE-A93E-1F29-2DB29180C4285099> (last visited May 15, 2006). A “Complete Property Valuation” includes the property’s market value, a cross-section of recent comparable sales, a legal description, tax assessment data, and the property’s sales history. *Id.*

153. ISMH.com FAQs, *supra* note 149 (stating telephone inquiries by prospective buyers met with questions and advice as to mortgage pre-qualification).

inquires about mortgage pre-qualification as well as real estate broker status.¹⁵⁴

ISMH.com's website and services are markedly different from what they were at the time of the NHAR's complaint, when the website's services went well beyond those detailed above.¹⁵⁵ The website allegedly offered advice to both buyers and sellers, without disclosing the status of its loyalties, while actively discouraging the parties from obtaining representation from licensed brokers.¹⁵⁶ The website often had a financial interest in the outcome of transactions, including the sale of mortgages.¹⁵⁷ Further, ISMH.com allegedly went so far as to claim that it owned the listings advertised on its website.¹⁵⁸

ZeroBrokerFees.com's services and business activities overlap with those of ISMH.com.¹⁵⁹ Both websites require pre-registration before "listing" a seller's property for sale.¹⁶⁰ Likewise, each website charges an advance fee for its advertising services.¹⁶¹ Accompanying a twenty-four hour hotline for customer questions, and unique to this website, is ZBF.com's Broker Assist Program.¹⁶² The Program purports to direct unsuccessful sellers to affiliated brokers who will work for discounted commissions.¹⁶³ Although the website offers this discounted broker referral service, ZBF.com specifically stipulates that its staff

154. See ISMH.com FAQs, *supra* note 149 (pledging pre-qualification of potential buyers before provision of seller contact information).

155. See ISMH.com Complaint, *supra* note 39, at 1-5 (charting services offered by website and outlining website's business practices).

156. ISMH.com Complaint, *supra* note 39, at 1-4 (asserting unlicensed website providing advice to uninformed consumers). ISMH.com required real estate brokers to obtain "licensure" from its company, a process of contractual affiliation, before allowing them any contact with sellers; this restriction also applied to brokers already representing a buyer-client. *Id.* at 4.

157. *Skyenet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2007 WL 817638, at *3 n.2 (D.N.H. Mar. 13, 2007) (describing ISMH.com's participation in real estate transactions).

158. *Skyenet Corp. v. Slattery*, Civil No. 06-cv-218-JM, 2008 WL 924531, at *11 (D.N.H. Mar. 31, 2008) (including advice, buyer screening, and claims of ownership among alleged acts of ISMH.com). At the time of NHAR's complaint, ISMH.com allegedly "represented to the public that it had 'sold thousands of homes saving sellers millions of dollars in commissions.'" *Id.*

159. *Skyenet*, 2007 WL 817638, at *3 (comparing services offered by ISMH.com and ZBF.com). *But see id.* at *3 n.2 (contrasting ZBF.com's basic services to ISMH.com's further participation in customer transactions).

160. See ZBF.com FAQs, *supra* note 47 (explaining registration process precedent to listing property).

161. *Id.* (explaining fee system for advertising services); see *Skyenet*, 2007 WL 817638, at *3 (noting ISMH.com and ZBF.com charge advance fees for services). ZBF.com charges per photograph until the listing sells—\$49.95 for one photograph; \$59.95 for two photographs; \$69.95 for three photographs; and \$79.95 for six photographs. ZBF.com FAQs, *supra* note 47. ISMH.com does not provide quotes for regular advertising services without registration. ISoldMyHouse.com, <http://www.isoldmyhouse.com> (last visited May 15, 2008). However, a seller may opt to make his home a "featured home"—featured as a property of the month. ISoldMyHouse.com, Feature Information, <http://www.isoldmyhouse.com/pages/makefeatured.html> (last visited May 15, 2008). For this service, ISMH.com quotes \$595.00 for two weeks or \$1,195.00 for one month. *Id.*

162. ZeroBrokerFees.com, <http://zerobrokerfees.com/> (last visited May 15, 2008) (offering discounted broker assistance). The website offers additional services to those sellers who are unable to successfully market their properties independently. *Id.* The Broker Assistance Program is provided despite acknowledgement of ZBF.com's unlicensed broker status. *Id.*

163. See ZBF.com FAQs, *supra* note 47 (quoting commissions in range of 1-4% as opposed to traditional 6% broker commission).

members are not licensed agents.¹⁶⁴

III. ANALYSIS

As demonstrated by ISoldMyHouse.com and ZeroBrokerFees.com, FSBO websites' business activities greatly vary.¹⁶⁵ Although FSBO websites typically offer advertising services for a flat fee, some offer specialized services.¹⁶⁶ These particularized services suggest an interest in the transaction and trigger application of licensing statutes.¹⁶⁷ A court charged with analyzing the constitutionality of applying real estate licensing laws to a FSBO website must first determine whether the website's activities fall within the applicable statute's brokerage definition.¹⁶⁸ If the brokerage definition includes the website's activities, and neither an exemption nor exclusion applies, the court must then analyze the constitutionality of the state regulation as applied to the website.¹⁶⁹

A. FSBO Websites' Typical Business Activities Fall Within Statutory Brokerage Definitions

Real estate brokerage definitions are inclusive, using broad terminology, so there is little doubt that these statutes encompass FSBO website activity.¹⁷⁰ Both ISMH.com and ZBF.com claim to "list" the properties advertised on their websites, an activity well within the purview of licensing laws.¹⁷¹ Further, each site, through its advertisements, promotes and facilitates the purchase and sale of real estate; these activities are commonly included in real estate brokerage statutes.¹⁷²

Although its activities place it within a brokerage definition, a website may

164. See ZBF.com FAQs, *supra* note 47 (stating unlicensed status of ZBF.com and its staff members).

165. See *supra* notes 150-164 and accompanying text (detailing broad range of services offered by representative FSBO websites).

166. See *supra* notes 150-164 and accompanying text (noting some websites' services extend beyond flat-fee advertising).

167. See *supra* notes 49-50 and accompanying text (acknowledging mere advertisement does not implicate agency relationship in need of regulation).

168. See *supra* notes 48-50 and accompanying text (describing *Skynet* court's statutory construction and application analysis).

169. See *supra* Part II.B-D (illustrating constitutional analysis of commercial speech, First Amendment, equal protection, and prior restraint issues).

170. See *supra* notes 37-42 and accompanying text (providing representative examples of real estate licensing laws and explaining their breadth).

171. See *supra* notes 37-43 and accompanying text ("listing" real property commonly included in licensing laws including Model Licensing Act); see also *supra* notes 150-164 and accompanying text (detailing claimed services of representative FSBO websites).

172. See *supra* notes 37-43 and accompanying text (promoting and facilitating sales generally considered brokerage activity); see also *supra* notes 150-164 and accompanying text (advertising listed property main function of FSBO websites).

be exempted from the statute's accompanying licensing requirements.¹⁷³ To fall under a typical exclusion or exemption, however, the website must restrict its services to those available from an excepted medium.¹⁷⁴ Where a FSBO website merely posts property advertisements and renders impersonal, generalized advice on maximizing value and sale potential, its actions are analogous to those of newspapers and magazines offering to do the same.¹⁷⁵

B. Commercial Speech Doctrine Implicated By Extended Services

ISMH.com's current website apparently segregates itself from the commercial transaction between its "listing" sellers and prospective buyers.¹⁷⁶ In its prior form, however, the combination of ISMH.com's proffered services and interference could be interpreted as its insertion into the transaction.¹⁷⁷ The website's provision of forms, screening and pre-qualification of buyers, and active discouragement of licensed broker involvement all suggest that ISMH.com took on a representative role while denying any liability for the mishandling of the transaction.¹⁷⁸ The creation of an online database of available properties alone may not directly propose a commercial transaction between the "speaker" and its "audience"; however, charging a fee for taking an active role in the sales process negates the impersonal nature of the database and places the website within the realm of commercial speech.¹⁷⁹

Similarly, ZBF.com's posting of customer-produced advertisements does not by itself propose a commercial transaction between itself and its audience.¹⁸⁰ The website potentially crosses the line into commercial speech, however, in its provision of personalized advice accessible by telephone and its provision of "discounted brokers" upon failure to sell.¹⁸¹ ZBF.com is communicating that it will facilitate the sale, despite lack of licensure; these assurances encourage customers to sign up for the website's services for a presumably low fee.¹⁸²

173. See *supra* notes 48-50 and accompanying text (explaining court's refusal to apply licensing requirements to website based on exclusion from brokerage definition).

174. See *supra* notes 51-54 and accompanying text (allowing exemption from statute where website acted like publication of general circulation).

175. See *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 876 (E.D. Cal. 2004) (rejecting commercial-speech analysis where website merely posted advertisements).

176. See *ISoldMyHouse.com*, <http://www.isoldmyhouse.com> (last visited May 15, 2008) (offering standardized forms, impersonal tips, and set advertising prices).

177. See *supra* notes 149-156 and accompanying text (describing services offered by ISMH.com).

178. See *ISMH.com Complaint*, *supra* note 39, at 1-5 (noting ISMH.com's disclaimer of liability).

179. See *supra* Part II.B (comparing cases implicating commercial speech or full First Amendment protection). All prospective buyers who contacted ISMH.com for property information were directed to pre-qualify with East/West Mortgage, then owner of the website, ISMH.com. *ISMH.com Complaint*, *supra* note 39. This solicitation of mortgagors demonstrates the pivotal role the website played in completing the transaction, as well as its vested interest in a proposed commercial transaction. *Id.*

180. See *supra* notes 162-164 and accompanying text (describing ZBF.com's range of services).

181. See *supra* notes 162-164 and accompanying text (explaining Broker Assist Program).

182. See *supra* notes 162-164 and accompanying text (explaining allure of FSBO websites' reduced fees).

The *Skynet* court declined to engage in constitutional analysis, as it held that ZBF.com was exempted from the brokerage statute.¹⁸³ The court stressed, however, that ZBF.com's activities were limited to informational services and did not propose agency relationships with its customers.¹⁸⁴ The court's distinction suggests that a website, such as ISMH.com, that purportedly involves itself in the real estate transaction should obtain licensure.

C. Application of the Central Hudson Gas Test

A website's involvement in property sales implicates the commercial speech doctrine and, accordingly, the *Central Hudson Gas* test.¹⁸⁵ The state has a substantial interest in protecting consumers from unqualified laypersons holding themselves out as professionals.¹⁸⁶ Aside from minimizing actual injuries those misled by unsavory practices suffer, and creating an avenue by which consumers may receive recompense for harms, the state has an interest in protecting consumer confidence where professionals occupy positions of trust.¹⁸⁷ The licensing statutes are narrowly drawn to achieve these legitimate purposes as licensing requires significant training, thus allowing consumers to rely on at least a minimum quality of service.¹⁸⁸

D. Licensing Requirements Do Not Act as Unconstitutional Prior Restraints on FSBO Websites' Freedom of Speech

A FSBO website claiming that state real estate broker licensing laws operate as unconstitutional prior restraints on free speech will likely fail.¹⁸⁹ Such a claim will fail because licensing requirements do not seek to restrict expressive conduct, and websites like ISMH.com and ZBF.com are not attempting to communicate a point of view to their websites' visitors.¹⁹⁰ Instead, these

183. *Supra* note 19 and accompanying text (noting *Skynet* court's constitutional analysis forestalled by placement of website within exemption).

184. *Supra* note 49 (highlighting court's focus on lack of agency relationship between website and customer).

185. *See supra* Part II.B (explaining commercial speech review applicable where economic transaction proposed by speaker to audience).

186. *See supra* note 134 (rationalizing prohibition of laypersons from unlicensed practice of law).

187. *See* *Lawline v. Am. Bar Ass'n*, 956 F. 2d 1378, 1385-86 (1992) (asserting reliability of professionals' competence important to consumer confidence); *see also* KLEINER, *supra* note 34, at 7 (stating consumer confidence created by high-quality service is main justification for licensing statutes).

188. *See* *Lan Lan Wang v. Pataki*, 396 F. Supp. 2d 446, 456 (S.D.N.Y. 2005) (rationalizing imposition of licensing statutes protects substantial governmental interest).

189. *See* *Lan Lan Wang*, 396 F. Supp. 2d 446 (rejecting website's claim that licensing law operated as prior restraint); *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868 (E.D. Cal. 2004) (dismissing prior restraint argument).

190. *See* *Zinnemann*, 347 F. Supp. 2d at 874 (stating licensing laws do not target patently expressive or communicative conduct); *see also supra* note 115 and accompanying text (providing demonstrative example of communicative conduct versus non-communicative conduct).

websites operate to advertise a product: real property.¹⁹¹ If they are attempting to communicate anything to their visitors, it is their ability to successfully assist in marketing a property for sale.¹⁹² Therefore, the state's regulations may affect a FSBO website's activities without triggering the strict standard for unconstitutional prior restraints.¹⁹³

E. State Licensing Requirements Do Not Violate FSBO Websites' Right to Equal Protection Under the Law

When a FSBO website claims that state regulations are violating its right to equal protection under the law, it is essential to determine the correct standard of review.¹⁹⁴ In *Zinnemann*, the court reviewed the state's legislation under strict scrutiny.¹⁹⁵ The court rationalized the application of this standard by suggesting the statute improperly discriminated based on media type; while newspapers and magazines were exempted from the statute's regulations, FSBO.com had to submit merely because it posted its property advertisements online.¹⁹⁶

The *Zinnemann* court asserted that FSBO.com's advertisements were equivalent to those placed in newspapers and featured in real estate brochures; the case does not provide, however, a full description of all services offered by the website.¹⁹⁷ When a FSBO website provides services beyond the scope of advertising, such as screening prospective buyers and providing personalized advice, it must be analogized to an active real estate broker rather than a passive newspaper advertiser.¹⁹⁸

Operating a FSBO website is not a fundamental right, nor are FSBO website operators a suspect class in need of enhanced protection from discrimination.¹⁹⁹ A court analyzing a FSBO website claim should therefore apply a rational basis standard of review.²⁰⁰ State licensing laws would likely pass the intermediate

191. See generally ISoldMyHouse.com, <http://isoldmyhouse.com/> (last visited May 15, 2008) (holding itself out to be FSBO advertising website); see also ZeroBrokerFees.com, <http://zerobrokerfees.com/> (last visited May 15, 2008) (featuring photographs and descriptions of properties for sale).

192. See *supra* note 149 and accompanying text (claiming vast numbers of customers succeed in selling property via website).

193. See *supra* Part II.C (providing cases and textual support for assertion that prior restraint claim will not prevail).

194. See *supra* Part II.D (explaining classifications and importance of separate standards of review).

195. See *supra* notes 141-146 and accompanying text (describing court's reasoning and holding).

196. See *supra* notes 141-146 and accompanying text (acknowledging court's rationale based on media-type discrimination).

197. See *ForSaleByOwner.Com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 870-71 (E.D. Cal. 2004) (describing FSBO.com as online advertiser of real estate for sale).

198. See *supra* note 2 and accompanying text (recognizing real estate brokers as purchase and sale facilitators).

199. See *supra* Part II.D (explaining certain categories of rights or classes afforded enhanced constitutional protection).

200. See *supra* Part II.D (setting forth standards whereby suspect classes and fundamental rights receive

scrutiny standard required in the context of commercial speech; therefore, the same statute would also survive the less stringent rational basis standard.²⁰¹ The state has a legitimate interest in consumer health, protection, and welfare.²⁰² Licensing laws have long been accepted as a legitimate means of ensuring minimum standards of professional quality and maintaining disciplinary proceedings for improper behavior.²⁰³

IV. CONCLUSION

Most courts have yet to address the question of whether FSBO websites should be subjected to licensing laws. As consumer use of online advertising and accompanying services becomes more prevalent, however, the issue becomes harder to avoid. NHAR made its complaint against ISMH.com, in part, to force an administrative ruling that may have precedential value should the matter reach trial.

Both broker organizations and FSBO websites express concern regarding the ambiguity of current licensing statutes' inclusion of FSBO websites. Ultimately, the courts must determine whether requiring FSBO websites to obtain licensure is within the best interests of consumers. Because licensing requirements promote consumer confidence, ensure minimum standards of quality, and provide avenues for remedies, courts should find that the government's legitimate state interest in consumer protection is aptly enhanced by broker licensing laws.

Consideration of each unique website's services is essential to a court's analysis of this issue. Where websites provide personalized services that delve into the realm of representation, the court should require broker licensure. A court should recognize that website activities will be the determinative factor in classifying the website's expression as "commercial." The court must also consider these activities when making a comparison between passive advertising, akin to magazines and newspapers, and active involvement in sales. Subjecting FSBO websites to licensing laws, where the website acts more like a transactional participant rather than an advertiser, does not deny them their rights to free speech or equal protection under the law.

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superior protection from discriminatory regulation).

201. See *supra* notes 185-188 and accompanying text (arguing licensing laws would survive intermediate scrutiny in commercial speech review).

202. See ISMH.com Complaint, *supra* note 39 (protesting FSBO website's unlicensed status due to potential for public harm).

203. See *Licensing*, *supra* note 7, at § 6.02 [1]-[3] (outlining purposes of maintaining licensing standards for real estate professionals).