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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 95

RAY LAM,

Appellant.

20 Eagle Street
Albany, New York 12207
April 24, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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1 CHIEF JUDGE LIPPMAN: And we're going to
2 start with number 95, People v. Lam.

3 Counselor?

4 MR. LUCENTE: Yes. I'd like to request
5 nine minutes for argument and one minute for
6 rebuttal.

7 CHIEF JUDGE LIPPMAN: You have it, one
8 minute for rebuttal. Go ahead.

9 MR. LUCENTE: Martin Lucente of The Legal
10 Aid Society Criminal Appeals Bureau on behalf of
11 appellant Ray Lam. If it pleases the - - -

12 CHIEF JUDGE LIPPMAN: Counselor, let me ask
13 you a question. How do we determine this case
14 without seeing the T-shirts that are at issue here?
15 How do we know whether it's expression or utilitarian
16 if - - - you know, we don't - - - there's no way of
17 getting a hold of - - - or looking at it?

18 MR. LUCENTE: We'd obviously rather have
19 them, but we don't. The way you determine it is to
20 find, as I think the record shows, that - - -

21 CHIEF JUDGE LIPPMAN: Whose burden is it to
22 make a record that we're able to review this
23 appropriately?

24 MR. LUCENTE: Well, I think on review, I
25 don't think it was our burden to actually take care

1 of the T-shirts, which were lost.

2 CHIEF JUDGE LIPPMAN: I'm not saying it's
3 your fault.

4 MR. LUCENTE: No.

5 CHIEF JUDGE LIPPMAN: But - - -

6 MR. LUCENTE: Well, I think - - -

7 CHIEF JUDGE LIPPMAN: - - - it is a
8 problem.

9 MR. LUCENTE: I think we've met any
10 burdens, and this is why. I think - - -

11 CHIEF JUDGE LIPPMAN: Tell us, yes.

12 MR. LUCENTE: - - - the record below
13 establishes that there was - - - that there were
14 images on the T-shirts, and the courts - - - all the
15 courts that ruled found that they are artistic
16 images.

17 CHIEF JUDGE LIPPMAN: That they were what
18 image?

19 MR. LUCENTE: They were artistic images.
20 Now, the question, of course, is their expressive
21 nature. And the fact that the courts - - - the trial
22 courts misapplied the standard that they were
23 applying of dominant purpose, they exercised what
24 amounted to an irrebuttable presumption, finding that
25 simply because the image was on a T-shirt, it wasn't

1 sufficiently - - -

2 JUDGE SMITH: Is it - - -

3 MR. LUCENTE: - - - expressive.

4 JUDGE GRAFFEO: Your client, during his
5 testimony, described some other artwork that he had
6 done, as opposed to the images on these T-shirts.
7 Does this mean that any graphic depiction on a - - -
8 on a T-shirt falls into the expressive category?

9 MR. LUCENTE: Well, under the ruling in
10 Bery v. New York, the first of the Second Circuit
11 cases that are applicable, simply having an - - -
12 simply being an artistic image is enough to show some
13 expressivity. And then you go through the rest of
14 the tests.

15 JUDGE SMITH: Do you - - - do you contend
16 that you have, I guess, what might be called old-
17 fashioned speech here, political messages, or is it
18 just that it's - - - or is it enough that it's
19 artistic?

20 MR. LUCENTE: Well, I think it's - - - we
21 have both. And the images themselves are artistic,
22 and the defendant's testimony referred to - - -

23 JUDGE SMITH: The defendant is pointing to
24 - - - as I gather from the - - -

25 MR. LUCENTE: He's pointing to things - - -

1 JUDGE SMITH: - - - transcript, he's
2 pointing to things - - -

3 MR. LUCENTE: Yes.

4 JUDGE SMITH: - - - saying that's the Iraq
5 war, that's 1984.

6 MR. LUCENTE: Exactly.

7 JUDGE SMITH: But we have no idea what he's
8 pointing at.

9 MR. LUCENTE: That's true; we don't have
10 it, but in terms of sufficiency of the record, I
11 think that's more than enough.

12 CHIEF JUDGE LIPPMAN: Counselor, does the
13 price of the T-shirt have anything to do with this?
14 They're apparently being sold for twenty dollars,
15 they're on a table; what does that tell us - - -

16 MR. LUCENTE: I don't think it has - - -

17 CHIEF JUDGE LIPPMAN: - - - or not tell us?

18 MR. LUCENTE: I don't think it tells us
19 anything at all, and the reason is, you could have
20 all sorts of pricing - - -

21 CHIEF JUDGE LIPPMAN: If they were - - -
22 but if they were artwork or different kinds of
23 artwork or different kinds of expression, wouldn't
24 you expect that some would be - - - cost more than
25 others - - -

1 MR. LUCENTE: Not necessarily.

2 CHIEF JUDGE LIPPMAN: - - - rather than a
3 uniform price?

4 MR. LUCENTE: Not necessarily for street
5 art, because it's street art. It would be absurd - -
6 -

7 CHIEF JUDGE LIPPMAN: For street art
8 everything is exactly the same price?

9 MR. LUCENTE: No, not - - - that's not my
10 point, but it would be probably absurd to price it
11 too high as street art. You wouldn't charge, you
12 know, Metropolitan Museum prices. But I think that
13 whole issue is a total red herring. Now, I would say
14 this, if it were at 100 dollars per T-shirt, that
15 might be an indication that it is being priced as
16 art. The fact that it is not doesn't indicate
17 anything other than the way they're selling stuff.

18 JUDGE READ: Why isn't this just a
19 legitimate time, place and manner regulation, in any
20 event?

21 MR. LUCENTE: Because the People - - - the
22 State - - - the City, rather, had other means of
23 regulating this which they didn't use. And because
24 they're - - -

25 JUDGE SMITH: Is there any record on that

1 at all, for either side?

2 MR. LUCENTE: There is some record as to
3 the second prong, whether there's an alternative
4 means for the defendant. There is testimony as - - -

5 JUDGE SMITH: What is in the record about
6 that?

7 MR. LUCENTE: Well, essentially, he talks
8 about other places that he sell - - - one other place
9 that he sells his T-shirt or had - - - I'm sorry, not
10 sells it, where it was exhibited. Frankly, in Hong
11 Kong, which doesn't help him a lot in terms of, you
12 know, getting something going here or selling
13 anything. But what we would rely on is - - -

14 JUDGE SMITH: Wouldn't it - - - if we were
15 to - - - if we were to get over the fact that we
16 don't have the stuff, and if we were to agree with
17 you that this is protected, that there's a First
18 Amendment interest here, and the question becomes
19 whether it's a legitimate time, place and manner
20 regulation, don't we have to remit for - - - for fact
21 finding on that?

22 MR. LUCENTE: I don't think so, because I
23 think there is enough - - - look, once again, I'd
24 refer to Bery v. City of New York. It's quite clear
25 you don't need a fact finding to know what's in the

1 regu - - - the administrative code. Section 2465 has
2 a laundry list of things which can be done to deal
3 with the sort of problems that the City or the People
4 claim are problems in regulating this. And I think
5 the main claim is traffic congestion. If you look at
6 that - - - and the Bery court pointed this out when
7 it ruled, that the time, place, manner requirements
8 hadn't been satisfied - - - it can be regulated that
9 way. Or - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but what
11 distinguishes this particular product from so many
12 other general vendors on the street? I mean, where
13 do we draw the line, especially in a place like where
14 this was being shown, how do we distinguish this
15 table from the next table or one around the other
16 side of the square? What distinguish - - - it's not
17 just that it's art of a fashion, that's it, end of
18 issue; you agree with that, right?

19 MR. LUCENTE: Right. I have sort of a - -
20 -

21 CHIEF JUDGE LIPPMAN: So how do we decide?

22 MR. LUCENTE: I have a two-part answer to
23 that. One, the First Amendment doesn't necessarily
24 allow for any distinction except through time, place,
25 manner analysis. In other words, once there's

1 expression, there are expressive images, then the
2 courts have to consider whether the City can regulate
3 that, or in this case, prohibit it, effectively - - -

4 JUDGE SMITH: I mean, that - - -

5 MR. LUCENTE: - - - it's time, place,
6 manner.

7 JUDGE SMITH: Is that true of anything
8 having any artistic component?

9 MR. LUCENTE: Images, under - - -

10 CHIEF JUDGE LIPPMAN: What if - - -

11 MR. LUCENTE: - - - Bery v. City of New
12 York .

13 CHIEF JUDGE LIPPMAN: What if it's a
14 picture on the T-shirt that says "Let's Go, Mets"?

15 MR. LUCENTE: Well, once again, that would
16 probably depend on the context, but it is - - -

17 CHIEF JUDGE LIPPMAN: On a table in - - -

18 MR. LUCENTE: But it is - - -

19 CHIEF JUDGE LIPPMAN: On a table in Union
20 Square, it says "Let's Go, Mets".

21 MR. LUCENTE: That - - -

22 CHIEF JUDGE LIPPMAN: It has a picture of
23 Mr. Met on it.

24 MR. LUCENTE: Well, under - - -

25 CHIEF JUDGE LIPPMAN: Is that expression?

1 Is it art?

2 MR. LUCENTE: Well, it's not necessarily a
3 question of whether it's art. It's a question, more
4 directly, whether it's expressive.

5 CHIEF JUDGE LIPPMAN: Is it expressive?

6 MR. LUCENTE: It is of something.

7 JUDGE GRAFFEO: Do we have to decide if
8 it's dominant?

9 MR. LUCENTE: Well, we've spent a lot of
10 time in our brief - - - I'm glad you asked that - - -
11 talking about the dominant purpose test. We argue
12 that it's ill-advised, illogical and totally
13 inappropriate in this situation. The - - -

14 CHIEF JUDGE LIPPMAN: What is the test?

15 MR. LUCENTE: The dominant - - - it's
16 whether it's more expressive than useful or vice
17 versa.

18 JUDGE SMITH: Well, what should be the
19 test?

20 MR. LUCENTE: The test should be what Bery
21 used, and a simple procedure. And in fact,
22 Mastrovincenzo itself, ultimately, used this whole
23 procedure as well. You look at the item, you hear
24 from the vendor or artist, find out what it means in
25 context. You make sure that there's an intent to

1 speak, to express something.

2 JUDGE SMITH: What it means, how - - -
3 suppose you have Joyce's Ulysses, you have to figure
4 out what it means before you can figure out whether
5 it's expressive?

6 MR. LUCENTE: No, not necess - - - not
7 necessarily. You simply need to know that it's
8 expressive.

9 JUDGE SMITH: That it must mean something.

10 MR. LUCENTE: That it must mean something.
11 It's - - -

12 JUDGE SMITH: What about an evening gown;
13 it's art, isn't it?

14 MR. LUCENTE: It's - - - it may be art, in
15 a sense, but depending on how it's assembled and what
16 the purpose of the - - -

17 JUDGE SMITH: You're saying - - -

18 MR. LUCENTE: - - - the vendor is - - -

19 JUDGE SMITH: - - - that clothing stores
20 are - - -

21 MR. LUCENTE: - - - it may or may not be
22 expressive.

23 JUDGE SMITH: I mean, all - - - all - - -
24 isn't all - - - all clothing art, in the sense that
25 some creator tried to make it look as attractive as

1 possible?

2 MR. LUCENTE: But, with due respect, I
3 don't think the question is necessarily whether it's
4 art; it's whether it's expressive.

5 JUDGE SMITH: You're saying there's some
6 art that expressive and some that isn't?

7 MR. LUCENTE: There may be, yes.

8 JUDGE SMITH: And how do you tell which is
9 which?

10 MR. LUCENTE: You look at it and then you -
11 - - you ask the person - - -

12 JUDGE SMITH: So wait, what about the Mona
13 Lisa, that expressive?

14 MR. LUCENTE: I would think so. Under Bery
15 - - -

16 JUDGE SMITH: Why is that more expressive
17 than somebody - - - that some amateur's idea of an
18 evening gown?

19 MR. LUCENTE: Well, under Bery v. New York,
20 once again, it points out that images, in themselves,
21 are hugely expressive, and often more expressive than
22 - - -

23 JUDGE SMITH: So but they say Jackson
24 Pollock's expressive, too.

25 MR. LUCENTE: And that's actually referred

1 to, I believe, in Bery v. - - -

2 JUDGE SMITH: What's - - - tell me how to
3 tell the difference between an evening gown and
4 Jackson Pollock.

5 MR. LUCENTE: Well, what you would have to
6 do is you would have to get in Jackson Pollock, if
7 he's selling it, and ask him. And you look at the -
8 - - you look at the piece of art, you listen to what
9 the vendor says - - -

10 CHIEF JUDGE LIPPMAN: Something as abstract
11 as Jackson Pollock, if we couldn't see it - - - if we
12 couldn't see it, is that a problem? I mean, to some
13 people, if there's lines on a - - - on a T-shirt or
14 whatever, a medium that it's being sold on - - -

15 MR. LUCENTE: Not - - -

16 CHIEF JUDGE LIPPMAN: - - - don't you have
17 to see it and have some sense of - - - or would you
18 say that it - - - something along those lines is
19 always expressive?

20 MR. LUCENTE: Well, we know, and I would
21 say yes. If you heard from Pollock and he said I
22 meant to express something in this and you have - - -

23 CHIEF JUDGE LIPPMAN: What if you heard
24 from a child who did it with water colors, you know,
25 like kids do, drawings on a piece of paper, and the

1 kid said I'm trying to say something; expressive?

2 MR. LUCENTE: Quite possibly, and the point
3 is it's not for the courts; the courts don't want to
4 determine whether something's good art, whether it's
5 highly expressive, whether it's successful, whether
6 words are effectively persuasive of your opinion.

7 JUDGE SMITH: Yeah, but if you go down that
8 road, then everything's protected, right? I mean,
9 you can't - - - you can't regulate clothing stores.

10 MR. LUCENTE: Not nec - - - no, not
11 necessarily. What you can do through the simple
12 procedure of having the work and the artist talk
13 about it or the vendor talk about it - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.
15 Okay, you'll have rebuttal. Let's hear from your
16 adversary. Thank you, counselor.

17 Counselor?

18 MR. SEEWALD: Good afternoon, Your Honors.
19 May it please the court. Andrew Seewald for the
20 people.

21 CHIEF JUDGE LIPPMAN: Counsel, the artist
22 in this case says that he does it on a computer and
23 then he puts it on to these T-shirts; sometimes
24 people frame them. He has messages that he's trying
25 to get out. Why isn't that expressive?

1 MR. SEEWALD: It might be expressive. It
2 may very well be expressive. The question, though,
3 was - - -

4 CHIEF JUDGE LIPPMAN: But he - - - but your
5 adversary says that's how you know; the artist
6 comes, talks about it, tells us what it is. Can we,
7 from that testimony, know that this is protected or
8 not protected?

9 MR. SEEWALD: Well, if we are going by the
10 defendant's own testimony in this case, then it would
11 be a very easy ruling for - - -

12 JUDGE SMITH: It would be easy - - - we'd
13 like to go by the exhibits, but you - - - but your
14 client destroyed them.

15 MR. SEEWALD: Well, we would like to have
16 the exhibits as well, Your Honors. But - - -

17 JUDGE SMITH: But isn't - - - the cen - - -
18 I mean, I understand he lost something too, but the
19 central evidence in the case is destroyed by the
20 State. Don't we have to resolve all doubts against
21 the State on a record like that?

22 MR. SEEWALD: Respectfully, no, Your Honor.

23 JUDGE SMITH: The City; I'm sorry.

24 MR. SEEWALD: Under this court's case of
25 People v. Yavru-Sakuk, the T-shirts in this case

1 don't - - - do not have substantial importance to the
2 defendant's appeal. Even the defendant himself has
3 not argued that they're substantially important to
4 the appeal, and here's why.

5 JUDGE SMITH: It's not important in a free
6 speech case to see the speech?

7 MR. SEEWALD: They - - - it doesn't really
8 matter what was on the shirts. That - - - that is
9 why they're not substantially - - -

10 JUDGE SMITH: Well, okay - - -

11 JUDGE RIVERA: How is that not - - - now,
12 how is that possible? How could it not be that the
13 image, which is the whole point of the case, is not
14 something that we need to see or doesn't - - - isn't
15 outcome determinative here?

16 MR. SEEWALD: Well, the whole point of the
17 case was whether the First Amendment was an
18 impediment to the defendant's conviction under the
19 General Vending Law. And here there was a basis in
20 the record for the lower court's ruling - - -

21 JUDGE SMITH: If he were selling Bibles,
22 would it be an impediment?

23 MR. SEEWALD: Yes, that would be a totally
24 different story.

25 JUDGE SMITH: How do we know that these

1 things didn't have Biblical verses on them?

2 MR. SEEWALD: Well, it's the defendant's
3 burden to show that they were sufficiently - - -

4 JUDGE SMITH: Yeah, but - - -

5 MR. SEEWALD: - - - expressive.

6 JUDGE SMITH: - - - but they were in the
7 record before you destroyed them.

8 MR. SEEWALD: Well, I think it's something
9 that I'd like to just clear up, based on the
10 questions and the answers from my adversary. The
11 defendant never actually testified about these T-
12 shirts.

13 JUDGE SMITH: Um-hum.

14 MR. SEEWALD: He never said what - - -

15 JUDGE SMITH: He doesn't have to testi - -
16 - we wouldn't need his testimony if we could look at
17 them.

18 MR. SEEWALD: But it's not just looking at
19 the shirts. We can - - -

20 JUDGE SMITH: That's sort of the best way
21 to see what they look like, isn't it?

22 MR. SEEWALD: But it's not just a question
23 of what they look like; it's what - - - what his
24 purpose was in selling them.

25 JUDGE SMITH: I understand that could be

1 important, but isn't it even more important what's on
2 them?

3 MR. SEEWALD: No, Your Honor. What's - - -

4 CHIEF JUDGE LIPPMAN: So it doesn't matter
5 what's on them?

6 MR. SEEWALD: I wouldn't say that it
7 doesn't matter. It might be the case that if there
8 were an explicitly written political message - - -

9 CHIEF JUDGE LIPPMAN: Pablo Picasso is
10 sitting out there at the table and selling T-shirts,
11 and he has his paintings, you know, on the T-shirts,
12 is it important?

13 MR. SEEWALD: He's still selling T-shirts;
14 they're still clothing.

15 CHIEF JUDGE LIPPMAN: So Pablo Picasso
16 could put art on his T-shirt and it's not protected?

17 MR. SEEWALD: He's - - - he's still - - -

18 JUDGE RIVERA: So are you arguing that as
19 long as it's clothing it can't be artwork?

20 MR. SEEWALD: I - - -

21 JUDGE RIVERA: Put aside the gown; you're
22 saying no clothing?

23 MR. SEEWALD: Not necessarily. I'm not
24 saying that just because it's clothing it can't be -
25 - - it can't - - -

1 CHIEF JUDGE LIPPMAN: What are you saying?

2 MR. SEEWALD: - - - have a dominant
3 expressive purpose.

4 CHIEF JUDGE LIPPMAN: What are you saying?

5 MR. SEEWALD: What I'm saying is that in
6 these circumstances, the clothing that the defendant
7 was selling, as he was selling them, that the
8 dominant purpose was - - -

9 JUDGE SMITH: Well, suppose it said - - -

10 MR. SEEWALD: - - - commercial - - -

11 JUDGE SMITH: Suppose it said "Stop the
12 War" on the T-shirts; you'd admit that's expressive?

13 MR. SEEWALD: Of course.

14 JUDGE SMITH: Even if they sold for twenty
15 dollars each?

16 MR. SEEWALD: That - - - of course the
17 shirts would be expressive.

18 JUDGE SMITH: But for all we know, and it
19 is quite possible on this record, that this has on it
20 a picture of a - - - a picture of the Iraq war,
21 obviously designed to stir up opposition to it. If
22 that's the case, it's obviously expressive, and how
23 do we know?

24 MR. SEEWALD: The question would be what
25 the defendant's motivation was.

1 CHIEF JUDGE LIPPMAN: What about - - - take
2 the Picasso hypothetical. He wants to get his art
3 directly to the people.

4 MR. SEEWALD: Um-hum.

5 CHIEF JUDGE LIPPMAN: He doesn't want to
6 just put it in the galleries. He has his artwork on
7 these T-shirts and he's selling them at twenty bucks
8 because he wants to get his message across, whatever
9 his artistic message is. Protected, right?

10 MR. SEEWALD: If - - - if that's what he
11 testified to, that would be a different circumstance.

12 JUDGE SMITH: Oh, if he's deceased? You
13 mean, if somebody else is selling Picasso's T-shirts
14 and you don't have Picasso's testimony to explain it,
15 you can't sell them?

16 MR. SEEWALD: Well, it would then depend on
17 what the - - - what the vendor's - - - what the
18 vendor's purpose was - - -

19 JUDGE RIVERA: So what do you say is his
20 purpose? What are you trying to say is his purpose?

21 MR. SEEWALD: His purpose was commercial
22 here. And in fact - - -

23 JUDGE RIVERA: Well, how can we know - - -
24 the point we're getting back to, how can we know that
25 if we don't know what's on the T-shirt?

1 MR. SEEWALD: Well, because we can - - -
2 the defendant never even said what - - - what - - -

3 JUDGE GRAFFEO: If we presume they're
4 expressive, why should you still prevail?

5 MR. SEEWALD: Because even if they have
6 expressive elements, the way that he was selling
7 them: they were folded, they were in piles, they
8 were - - - he was selling them at this uniform place.

9 CHIEF JUDGE LIPPMAN: So the test is
10 predominant purpose?

11 MR. SEEWALD: The test is predominant
12 purpose, yes, Your Honor.

13 JUDGE SMITH: So even the stuff, the war T-
14 shirts, if they're sold folded on the table they're
15 not expressive?

16 MR. SEEWALD: It depends what the
17 predominant purpose is of the person selling the
18 shirt, and - - -

19 JUDGE SMITH: Suppose - - - suppose his
20 predominant purpose is to make money, as Thomas
21 Paine's was when he sold Common Sense; then there's
22 no protection?

23 MR. SEEWALD: Then the - - - it's a
24 different analysis. And the - - - what's on the
25 shirt can be part of it, but here, the defendant

1 himself never even said what his motivation was in
2 selling these shirts. When he was - - - when he
3 testified - - -

4 JUDGE GRAFFEO: So what's the test for
5 predominant purpose, if we accept that as the test,
6 which your adversary disagrees with. What do you - -
7 - what do you look at to determine - - - just because
8 they're folded on the table, that's enough?

9 MR. SEEWALD: Well, it's - - - the test is
10 whether the - - - it's weighing the expressive
11 elements of the item against the utilitarian purpose
12 of the item to determine what the dominant purpose of
13 that item was.

14 JUDGE RIVERA: The fact that he made it a
15 T-shirt so that someone walking around the streets of
16 New York could see this artwork makes it less
17 expressive? It doesn't have an artistic purpose to
18 it? I don't understand.

19 MR. SEEWALD: It's still - - - it's still
20 expressive - - -

21 JUDGE RIVERA: Um-hum.

22 MR. SEEWALD: - - - but it takes on a
23 different dominant purpose once it's clothing.

24 JUDGE PIGOTT: The word - - - it seems like
25 we're focusing on - - - it's time, place and manner

1 is what you want to get to, right? I mean, it
2 doesn't make any difference if it's Picasso, if he's
3 selling them in Walmart for 14.95 by the gross, he's
4 probably not trying to push his art; he's probably
5 trying to sell T-shirts.

6 MR. SEEWALD: Right, and of course, a city
7 can regulate even the purest form of expression with
8 a valid time, place, and manner restriction. As long
9 as it's content-neutral and not discriminating based
10 on viewpoint, it can do that. It can regulate a
11 demonstration against the Republican National
12 Convention. It can regulate a parade. It can
13 regulate other forms of expression with valid time,
14 place, and manner - - -

15 JUDGE SMITH: But it is subject to
16 intermediate scrutiny when it does it?

17 MR. SEEWALD: Yes.

18 JUDGE SMITH: And how can you - - - how do
19 we know, on this record, that this - - - this
20 regulation passes intermediate scrutiny?

21 MR. SEEWALD: Well, because it's - - - it's
22 content-neutral, there's no reason - - -

23 JUDGE SMITH: No, it's got - - - if it
24 weren't content-neutral, you wouldn't have
25 intermediate scrutiny.

1 MR. SEEWALD: Right.

2 JUDGE SMITH: That's the starting point.

3 MR. SEEWALD: And it was narrowly tailored
4 to achieve a significant - - -

5 JUDGE SMITH: How do we know that?

6 MR. SEEWALD: - - - governmental interest.

7 JUDGE SMITH: How do we know that you got
8 the right number of licenses, that you couldn't have
9 500 more licenses and still not have made your
10 congestion?

11 MR. SEEWALD: Well, the question is whether
12 the regulation, as written, reduces the congestion.
13 Does it - - - does it help reduce - - -

14 JUDGE SMITH: You could reduce the
15 congestion by giving - - - by prohibiting all street
16 vending, right? Isn't the question whether it's - -
17 - whether it's narrowly tailored, whether it's not -
18 - - whether you're not prohibiting significantly more
19 speech than you have to?

20 MR. SEEWALD: Exactly. And that's why it's
21 important to - - -

22 JUDGE SMITH: Then how do we know that?

23 MR. SEEWALD: Well, it's important to look
24 at the statute itself, and the statute itself accept
25 - - -

1 CHIEF JUDGE LIPPMAN: Do you think this
2 statute is pretty much all encompassing, with certain
3 carve-outs, but it's pretty broad?

4 MR. SEEWALD: Well, the - - - the carve-
5 outs are huge. It accepts written matter, including
6 newspapers, books. And then when you put on top of
7 that the Bery consent decree that accepts paintings,
8 sculptures, photographs, prints - - -

9 CHIEF JUDGE LIPPMAN: But I think some of
10 them - - - maybe Judge Pigott asked you this before,
11 if it's on clothing, that's different always?

12 MR. SEEWALD: Right, well, I come back to
13 the fact that - - -

14 CHIEF JUDGE LIPPMAN: If it's the photo,
15 the printing, the whatever it is, if it's on clothing
16 - - -

17 MR. SEEWALD: No, not - - -

18 CHIEF JUDGE LIPPMAN: - - - that changes
19 the dynamic?

20 MR. SEEWALD: - - - not always, no. And
21 it's not the case that anyone selling decorated
22 clothing would - - - would be subject to prosecution
23 under this. And in fact, Mastrovincenzo, itself - -
24 -

25 CHIEF JUDGE LIPPMAN: I mean, - - -

1 MR. SEEWALD: - - - was clothing.

2 CHIEF JUDGE LIPPMAN: - - - a graffiti hat
3 is okay, we know - - -

4 MR. SEEWALD: Well, under the - - -

5 CHIEF JUDGE LIPPMAN: - - - can be.

6 MR. SEEWALD: Under the circumstances of
7 Mastrovincenzo where there was testimony about how
8 these were custom-created designs based on a back and
9 forth between the - - - the customer and the - - -
10 and the vendor - - -

11 CHIEF JUDGE LIPPMAN: All right. One last
12 question, at least for me. What's the bottom line
13 about our not having the artwork? Who do we hold
14 that against? Do you accept Judge Smith's premise
15 that we should hold it against you because you
16 destroyed it? Is it their burden to produce the
17 record, and it doesn't matter who destroyed it?
18 What's the significance of not having the T-shirts?

19 MR. SEEWALD: Well, the bottom line is that
20 the exhibits hold no substantial importance to the
21 case because the court can resolve the case without
22 seeing the exhibits. But even if the court finds
23 that - - - that the exhibits were necessary to
24 resolve the case, then the remedy would be to remand
25 the case to the trial court for a reconstruction

1 hearing. And that's from People v. - - -

2 CHIEF JUDGE LIPPMAN: Okay, coun - - -

3 MR. SEEWALD: - - - Yavru-Sakuk.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE SMITH: I - - -

6 CHIEF JUDGE LIPPMAN: I'm sorry, Judge

7 Smith.

8 JUDGE SMITH: I do have a question.

9 CHIEF JUDGE LIPPMAN: Sure.

10 MR. SEEWALD: Yes.

11 JUDGE SMITH: I don't know; there's a case

12 called LaFontaine; you know what I'm talking about?

13 Wouldn't that mean that since the - - - as
14 I understand it, the trial court here did not pass on
15 intermediate scrutiny or narrowly tailored or any of
16 that; doesn't that bar both the Appellate Division
17 and us from looking at it?

18 MR. SEEWALD: Well, here I would say that
19 the trial court did rule on the question of whether
20 the First Amendment was an impediment to the
21 defendant's conviction, even if it didn't fully
22 explain the - - -

23 JUDGE SMITH: Yeah, but of course a lot of
24 those LaFontaine cases the trial court said - - -
25 ruled on a Fourth Amendment question. But you don't

1 - - - you know, LaFontaine doesn't usually paint that
2 broadly.

3 MR. SEEWALD: Right. So it would be the
4 same idea, then, as with the fact that the shirts are
5 missing, that if the - - - if the court finds that
6 there was not a sufficient ruling from the trial
7 court as to the intermediate scrutiny test and the
8 time, place, and manner restriction, then the remedy
9 would be to remand this case to the trial court for a
10 ruling - - - a more specific ruling.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.
12 Thank you.

13 MR. SEEWALD: Thank you very much.

14 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

15 MR. LUCENTE: Yes. I'd just like to say I
16 think you have what you need to grant the defendant
17 relief in this case.

18 The statement that he didn't testify as to
19 the T-shirts is actually not correct. He referred to
20 the defense exhibits and he was asked are they
21 substantially similar to the T-shirts. Now, while
22 the People - - - the prosecutor argued that they were
23 different somehow, the defense lawyer said they were,
24 and crucially, the court admitted them, finding that
25 they were relevant because they were the same. The

1 Court had both of the exhibits before it and it made
2 that finding.

3 JUDGE SMITH: Both of which are now
4 missing.

5 MR. LUCENTE: Yes, that's true. I said at
6 the beginning I agree wholeheartedly, it's not a good
7 thing that the exhibits aren't here.

8 JUDGE PIGOTT: Yeah, but I mean, we know
9 what was on them, right? I mean, didn't he testify
10 to what was on his shirts?

11 MR. LUCENTE: Essentially, yes.

12 JUDGE PIGOTT: Yeah, so I mean we can
13 decide that.

14 JUDGE SMITH: When he pointed and said
15 that's the Iraq war, what was he pointing at?

16 MR. LUCENTE: Well, he was pointing at one
17 of the T - - - at one of the exhibits.

18 JUDGE PIGOTT: Was it a picture or words?

19 MR. LUCENTE: It probably wasn't words, and
20 I say that because the - - - some of the papers in
21 the trial court with regard to the motion state that
22 there are not words on the T-shirts. That's what I'm
23 basing that on.

24 JUDGE SMITH: So we have no idea what the
25 picture was; it could have been an abstraction or it

1 pictures of soup cans.

2 JUDGE PIGOTT: Is that a yes? I mean - - -

3 MR. LUCENTE: Yes. Yes.

4 JUDGE PIGOTT: All right. So you're saying
5 that there - - -

6 MR. LUCENTE: Under certain - - -

7 JUDGE PIGOTT: - - - there really - - -

8 MR. LUCENTE: - - - under the right
9 circumstances.

10 JUDGE PIGOTT: - - - is no regulation.

11 There's no - - - I mean, anybody that wants to call
12 something art can call it art and sell it and they
13 don't need a license. You can - - -

14 MR. LUCENTE: No, I don't agree.

15 JUDGE PIGOTT: You can paint your cats and
16 say they're expressive.

17 MR. LUCENTE: I don't agree with that.

18 Even under the Mastrovincenzo test, the last thing it
19 did is it took testimony from the vendors and it then
20 found that - - - and it found that the items were
21 expressive. You put all that together, it's not as
22 simple - - - in other words, what I'm saying is there
23 are mechanisms to make sure that someone isn't just
24 masquerading - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MR. LUCENTE: - - - and pretending that
2 it's artistic.

3 CHIEF JUDGE LIPPMAN: Okay, thanks. Thank
4 you both. Appreciate it.

5 MR. LUCENTE: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of THE PEOPLE OF THE STATE OF NEW YORK v. Ray Lam, No. 95 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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