JONES V. SCHNEIDERMAN AND THE RIGHT TO FIGHT: WHY NEW YORK'S BAN ON MIXED MARTIAL ARTS IS UNCONSTITUTIONAL[1]

> Nobody is fighting on rooftops, throwing each other through glass. None of that stuff. It's guys who are mixed martial artists based out of New York, and what they want to do is test their skills on a level playing field where, if they feel they can do well, they progress.[2]

I. INTRODUCTION

In 1997, New York State banned professional Mixed Martial Arts ("MMA") matches and exhibitions.[3] The state passed the Professional Combative Sports Ban ("NY Ban") because MMA was excessively violent and poorly regulated.[4] In 2013, the plaintiffs in *Jones v. Schneiderman* challenged the NY Ban as an unconstitutional restriction of free speech.[5] While the District Court for the Southern District of New York accepted that MMA might involve speech protected by the First Amendment, it dismissed the argument that a reasonable viewer would understand the message, and therefore dismissed the complaint.[6]

Within a decade, MMA has quickly become popular among participants and spectators, in large part because the collaboration of fighting styles provides for impressive exhibitions of technical and combative ability.[7] The constantly evolving art form draws from a variety of martial arts and combat sports in an effort to create a unified fighting form that surmounts all others.[8] Traditional styles such as Karate, Jiu-Jitsu, Judo, Muay Thai, and Greco-Roman wrestling are drawn from, as well as contemporary fighting forms such as boxing, kickboxing, grappling, and freestyle techniques.[9] Modern MMA is famous in part due to promotion efforts

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[1] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, at *9 (S.D.N.Y. 2013) (granting defendant's motion to dismiss First Amendment claim that New York's ban on live Mixed Martial Arts performances violates constitutional guarantee of free speech).

[2] Josh Gross, *New York MMA: An Underground Story*, ESPN.COM (Feb. 16, 2011), http://sports.espn.go.com/extra/mma/columns/story?id=6128694 (describing dangerous nature of MMA fights in New York, absent regulation because they occur despite the NY Ban).

[3] *See* N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (prohibiting live performance of combative sports, with certain exceptions determined by Athletic Commission).

[4] *See id.* (banning combative sports, but not MMA explicitly).

[5] *See Jones*, 2013 WL 5452758, at *6 (accepting plaintiffs' argument that MMA live performances meet first prong of *Spence* symbolic conduct test).

[6] *See id.* (holding plaintiffs failed to argue MMA live performances satisfy second prong reasonable viewer prong of *Spence* test); Spence v. Washington, 418 U.S. 405, 410 (1974) (providing two part test to determine whether conduct is symbolic and therefore subject to First Amendment analysis).

[7] *See* Second Amended Complaint at 3, Jones v. Schneiderman, No. 11 Civ. 8215 (S.D.N.Y. Oct. 15, 2013) (hereinafter Second Amended Complaint) (explaining some ways that MMA has expanded in United States popularity and recognizing that "[m]ixed martial arts appeal to fans of nearly every age and demographic, and its influence is widespread"); *see also* Michael Kim, *Mixed Martial Arts: The Evolution of a Combat Sport and Its Laws and Regulations*, 17 SPORTS LAW. J. 49, 50-57 (2010) (exploring rise of MMA in United States and development of rules to curb violence in fights). Mixed Martial Arts: The Evolution of a Combat Sport and Its Laws and Regulations,17 Sports Law. J. 49 (2010).

[8] *See generally* Kim, *supra* note 7 (describing evolution of MMA in United States); *see also* Second Amended Complaint, *supra* note 7, at 3 (describing First Amendment claim against New York State).

[9] *See generally* Kim, *supra* note 7 (describing MMA in United States).

by the Ultimate Fighting Championship ("UFC").[10] Through UFC sponsorship and broadcasting, MMA fighters receive funding to participate in a great number of fights that are viewed by audiences worldwide.[11]

One critic described MMA as a means to global understanding, no less expressive than sharing music and literature:

> [A] hundred years of well meaning "games of world peace" have done less for international understanding than the emergence of mixed martial arts, wherein each country is going to take its best guys, and they are going to take their best game and their best understanding of the other guy's game into the ring, and we shall see what we shall see. . . . How will this global economy evolve? With mixed martial arts, *the true marketplace of ideas*.[12]

Despite its popularity, MMA has acquired an infamous reputation for violence, lack of regulation, and danger.[13] Although it originally lacked regulation when it emerged in the United States in the 1990s (often referred to as "no-holds barred" fighting), MMA has become one of the most highly regulated professional spectator sports in the country.[14] This transformation was a result of the widespread criticism in the 1990s of MMA's inherent violence.[15] Many states even threatened to ban UFC fighting altogether due to its violent nature and lack of rules.[16]

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[10] *See Jones*, 2013 WL 5452758, at *3 ("MMA is now one of the fastest growing spectator sports in the United States. Fights are regularly broadcast on network and pay-per-view television, and Plaintiffs estimate that the UFC reaches five hundred million homes worldwide.").

[11] *See* Second Amended Complaint, *supra* note 7, at 1 (introducing MMA in its modern form in United States). In fact, "UFC reaches half a billion homes worldwide and can be seen on some form of television in 155 countries and territories in 22 different languages." *Id.* Most notably, MMA emerged in the United States in 1993 when Royce Gracie won the first Ultimate Fighting Championship. *Id. See generally* Daniel Berger, *Constitutional Combat: Is Fighting a Form of Free Speech? The Ultimate Fighting Championship and Its Struggle Against the State of New York over the Message of Mixed Martial Arts*, 20 MOORAD SPORTS L.J. 381 (2013) (describing MMA in United States and analyzing potential outcomes of *Jones v. Schneiderman*).

[12] David Mamet, *Ultimate Fighting: The Final Frontier*, THE OBSERVER, Sept. 20, 2007, *available at* http://www.guardian.co.uk/sport/2007/sep/30/features.sport4 (emphasis added) (describing utility of MMA and how much it has and continues to contribute to globalization, human understanding, and healthy competition and claiming that MMA live performances contribute to growing global economy and sharing ideas across different cultures); *see also* Second Amended Complaint, *supra* note 7, at 224 (quoting Mamet). Mamet explains that by its very nature, MMA requires inter-cultural connection because a fighter must train in different styles, which derive from different cultures. *Id.* "The [MMA] fighter, thus, will and must school himself in the forms evolved out of many different cultures." *Id.*

[13] For a discussion of possible responses to the concern of violence in MMA, see MMA: The Controversy, *infra* note 76 (explaining role of rules and regulations amongst other factors in curbing violence of fights).

[14] Second Amended Complaint, *supra* note 7, at 2 (explaining nature of early MMA in United States). The plaintiffs described in their Complaint that there is a distinction between the Unified MMA Rules and the more specific Professional Unified MMA Rules, which refer to live performances. *Id. See generally* UNIFIED RULES AND OTHER IMPORTANT REGULATIONS OF MIXED MARTIAL ARTS, *available at* http://media.ufc.tv//discover-ufc/Unified_Rules_MMA.pdf (hereinafter UNIFIED MMA RULES) (providing complete version of Unified MMA Rules). These professional rules regulate things like fighters' weight, equipment, the ring space, judging, fouls, and what to do in case of injuries. *Id.*

[15] *See* Kim, *supra* note 7 (explaining how rules emerged in response to unregulated violence in UFC fights in 1990s). Even Senator John McCain campaigned against MMA, calling it "human cockfighting" and petitioning states to ban UFC fights. *Id.*

[16] *See id.* at 52 ("As a result, thirty-six states banned MMA, including New York.").

Today, MMA fighting is regulated by the Unified Mixed Martial Arts Rules, or state regulations modeled substantially on these rules.[17]

Despite the regulations, promoters and legislators disagree on whether MMA is too dangerous, as evidenced by the passage of the unpopular NY Ban.[18] The Professional Combative Sports Ban declares that "[n]o combative sport shall be conducted, held or given within the state of New York, and no licenses may be approved by the commission for such matches or exhibitions."[19] The statute defines "combative sport" as "any professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kinds to the body of an opponent or opponents."[20]

In *Jones v. Schneiderman*, the Southern District Court in New York weighed the concern about MMA violence against the love for MMA; the Court ultimately concluded that there is no salient First Amendment argument worth reviewing.[21] The state of New York argued that the purpose of the Combative Sports Ban is to protect society and viewers from the violent message behind MMA.[22] The state believed that live fights were purely violent exchanges between fighters.[23] It is important to note that at the initial stage of the analysis it doesn't matter so much *what* the message behind the art is, but whether there *is* a message being communicated through the conduct.[24] The *Jones* Court turned to the *Spence v. Washington* two-part test to determine whether live performance MMA is symbolic conduct.[25] The test asks whether (1) the conduct is intended to communicate and (2) a reasonable viewer would likely understand what the intended message is.[26] The District Court granted the State's motion to dismiss because it held that the plaintiffs had failed to show a likely argument for the second prong of the *Spence* test.[27]

[17] *See* Second Amended Complaint, *supra* note 7, at 2 (describing MMA in United States); *see also* UNIFIED MMA RULES, *supra* note 14 (providing complete rules); *see also* Kim, *supra* note 7, at 63-64 (explaining MMA rules are state-based and vary slightly).

[18] *See* Kim, *supra* note 7, at 52 ("Despite its success, the brutal and unregulated nature of the sport quickly drew many critics, including various government officials.").

[19] N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (prohibiting combative sport live performances in New York).

[20] *Id.* (defining combative sports).

[21] *See generally* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758 (S.D.N.Y. 2013) (granting motion to dismiss First Amendment challenge to NY Ban).

[22] *See* Second Amended Complaint, *supra* Note 12, at 9-10 (explaining purpose of NY Ban as well as purpose of live performances).

[23] *See id.* (describing purpose of MMA live performances).

[24] *See generally* Spence v. Washington, 418 U.S. 405 (1974) (providing two part test to determine whether conduct is symbolic and therefore subject to First Amendment analysis) (emphasis added).

[25] *See Jones*, 2013 WL 5452758, at *3 (applying *Spence* two-part symbolic conduct test to MMA live performance First Amendment claim). Live performance is how live fights are commonly referred to, describing "matches and exhibitions," which is the actual language from the NY Ban. *See* N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (prohibiting live performance of combative sports, with certain exceptions determined by Athletic Commission).

[26] *Jones*, 2013 WL 5452758, at *3 (holding MMA live performances pass first prong, but not second prong of *Spence* symbolic conduct test).

[27] *See id.* at *7 (finding plaintiffs failed to argue viewers understand message behind MMA). The plaintiffs in *Jones* argued that the message behind MMA live performance is that it is entertainment, which they failed to show reasonable viewers understand, thereby failing the second prong from *Spence*. *Id.*

The District Court in *Jones v. Schneiderman* followed the *Spence* analysis and utilized a two-part test to determine that live performance MMA is not expressive conduct.[28] However, this outcome should not be dispositive because a First Amendment claim can still be made to challenge MMA bans.[29] Indeed, future MMA decisions will likely favor plaintiffs, since the *Jones* decision set forth a test that can be met easily with well-plead facts.[30] Successful plaintiffs will need to argue MMA fights are symbolic conduct both because the performers intend to communicate through these performances and because a reasonable viewer likely understands the intended message.[31] If plaintiffs hope to mount a successful First Amendment challenge to bans on MMA, they should argue that MMA is a convergence of art, tradition, and culture, and *that* is why the First Amendment protects live matches.[32]

This Note presents an argument for the *Jones* plaintiffs to use on appeal as well as for future plaintiffs to challenge any ban on MMA.[33] Part II briefly provides the facts of *Jones v. Schneiderman* to establish the context wherein *Spence* applies to sports and particularly to live fights.[34] Part III discusses the relevant background regarding MMA generally, the Ban, and the evolution of regulations to mitigate violence.[35] Part IV examines the argument that the plaintiffs in *Jones* used to claim a First Amendment violation in light of the *Spence* line of inquiry.[36] Part V demonstrates that MMA is about tradition and fighting ability and that because reasonable viewers understand this, the First Amendment protects live fights as speech.[37] Finally, this Note briefly considers the impact of *Jones* on MMA in New York and the importance of winning not only a Due Process vagueness claim, but setting the precedent that live performance fights are symbolic conduct protected by the First Amendment.[38]

II. FACTS

[28] *See id.* (finding reasonable viewer standard inadequately argued).
[29] *See id.* at *6 (arguing MMA live performances are inherently expressive under First Amendment).
[30] For an alternative argument under *Spence*, see *infra* note 139 and accompanying text (proposing plaintiffs plead different message of MMA such that reasonable viewer prong of *Spence* will be met).
[31] *See* Spence v. Washington, 418 U.S. 405, 413 (1974) (explaining reasonable viewer second prong to symbolic conduct test); *see also Jones*, 2013 WL 5452758, at *7 (explaining why motion to dismiss granted based on plaintiffs' failure to argue reasonable viewer would understand message of MMA performances). In *Jones*, the plaintiffs argued that the message behind MMA is entertainment. *Id.*
[32] *See, e.g.*, David Mamet, *Ultimate Fighting: The Final Frontier*, THE OBSERVER, Sept. 20, 2007, *available at* http://www.guardian.co.uk/sport/2007/sep/30/features.sport4 (emphasis added) (proposing that MMA provides platform for global understanding).
[33] *See infra* note 139 and accompanying text (presenting alternative argument to what *Jones* plaintiffs attempted in 2013).
[34] For a discussion of the facts giving rise to *Jones*, see *infra* notes 39-55 and accompanying text (providing facts of case and terms of statute).
[35] For a discussion of the relevant background, see *infra* notes 65-112 and accompanying text (providing background information concerning *Spence*, MMA, NY Ban, and rules and regulations that have emerged in response to criticism of excessive danger and violence).
[36] For a discussion of the arguments made in the present case and its outcome, see *infra* note 130 and accompanying text (discussing argument plaintiffs made in *Jones*, test applied from *Spence*, and outcome resulting from District Court finding plaintiffs failed to pass second prong of *Spence*).
[37] For a discussion of an alternative argument for First Amendment protection, see *infra* notes 138-157 and accompanying text (providing different message behind MMA and way to explain to court that reasonable viewers come to live performances *because* of this message and therefore understand message).
[38] For a discussion of the impact of *Jones*, see *infra* notes 175-185 and accompanying text (describing danger of banning MMA fights).

A. What is Mixed Martial Arts?

To understand the issues that control the legal controversy, it is important to first consider the historical development of MMA.[39] Jeff Blatnick, who won two heavyweight wrestling championships in the 1970s and a gold medal in Greco-Roman wrestling in 1984, is credited with creating the label "Mixed Martial Arts."[40] Originally, MMA found its roots in Pankration matches from Ancient Greece.[41] However, this art form eventually died out because of its inherently violent nature.[42]

The next type of mixed fighting arrived in Japan during the 1600s through 1800s in the form of Jiu-Jitsu.[43] One individual, Jigoro Kano, studied Jiu-Jitsu and eventually developed Judo.[44] Kano developed a code of fighting ethics, and over time Judo became regarded as gentlemanly and non-violent.[45] Kano's student, Mitsuyo Maeda, began to travel worldwide teaching Judo through live performances of the art.[46] At one fight, Maeda continued to fight even though pinned down by a wrestler who had challenged him. Maeda eventually won the fight.[47] Judo gained recognition through this introduction of fighting from the ground.[48] Maeda finally settled in Brazil, where he began to teach Judo to Carlos Gracie, whose family would quickly gain international fame for establishing Brazilian Jiu-Jitsu. Mitsuyo Maeda's encounters with different fighters and styles across the globe innovated Judo, which in turn contributed to today's MMA.[49]

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[39] For a general discussion of how MMA has evolved historically, see Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209 (2010) (exploring evolution of MMA, how it came to United States, and how it has transformed from violent unregulated spectacle into highly regulated and respected sport).

[40] *See* Dave Meltzer, *Whenever You Hear the Term Mixed Martial Arts, You Should Think of Jeff Blatnick*, MMAFIGHTING.COM (Oct. 24, 2012, 7:04 PM), http://www.mmafighting.com/2012/10/24/3550680/whenever-you-hear-the-term-mixed-martial-arts-you-jeff-blatnick (stating that Jeff Blatnick was also prominent UFC commentator in1980s and 1990s). He was also a large contributor to the development of the regulations that today protect fighters in live performance MMA. *Id.* Some people even say that he "saved" the UFC from complete dissolution in the late 1990s. *Id.* The title was likely inspired by Japanese professional wrestling matches, made famous worldwide by the 1976 fight between Muhammad Ali and Antonio Inoki. *Id.*

[41] *See* Berger, *supra* note 11, at 384-86 (describing evolution of MMA and its heritage of Pankration – MMA's first form of mixing fighting styles into single event).

[42] *See* Kim, *supra* note 7, at 50-51 ("The ancient Olympic sport, Pankration, only prohibited eye gouging and biting. . . . The match itself continued uninterrupted until one of the two combatants surrendered, suffered unconsciousness, or was killed.").

[43] *See* Berger, *supra* note 11, at 386 (describing emergence of mixed martial arts in modern United States).

[44] *See id.* (introducing Kano, who became a legendary contributor to modern day MMA).

[45] *See id.* (highlighting importance of ethics in MMA); *see also* Maher, *supra* note 39, at 227-28 (arguing MMA is legitimate sport partly because it has become so rule-bound). Today, Judo is still regarded as a polite form of fighting, evidenced by the many showings of respect and gratitude between fighters. *Id.*

[46] *See* Berger, *supra* note 11, at 387 (emphasizing spiritual nature of Kano's interpretation and teaching of Jiu - Jitsu). "Kano's fighting method also integrated an emphasis on spiritual balance, a tool Kano felt was necessary to capitalize on the mental aspect of fighting." *Id.*

[47] *See id.* at 388 (explaining that Maeda's technique became "tempered by real-world fighting experience").

[48] *See id.* at 386-87 (describing how ground fighting and throwing techniques characterize Judo).

[49] *See id.* at 388 ("Not a philosopher or even much of a thinker like his teacher, Maeda exhibited his knowledge of judo the best way he knew how – *in actual competition*.") (emphasis added).

In Brazil, Gracie started his own school and developed Brazilian Jiu-Jitsu from the ground fighting methods he learned from Maeda.[50] He became renowned in Brazil, and was challenged time and again by local fighters in what became known as "vale tudo," or "anything goes," matches.[51] The Gracie family is responsible for popularizing Brazilian Jiu-Jitsu not only throughout Brazil, but in the United States as well.[52] In 1989, Rorion Gracie, who had made it his mission to bring his family's martial art tradition to the world, made a legendary proposal: he challenged any man on earth to fight him.[53] Hollywood caught wind of his challenge, and developed the War of the Worlds – a single elimination fight to take place in Colorado that year.[54] When Gracie won the fight (renamed and trademarked as the Ultimate Fighting Championship), Brazilian Jiu-Jitsu acquired instant fame in the United States, eventually giving birth to today's MMA.[55]

B. *Jones v. Schneiderman*

In *Jones v. Schneiderman*, numerous amateur and professional MMA representatives, including UFC founder Zuffa, LLC, challenged New York's 1997 Ban on combative sports, claiming it violated the First Amendment.[56] New York moved to dismiss the claim and the District Court granted the motion regarding the First Amendment issue, but denied it as to another as-applied vagueness argument.[57] While the plaintiffs argued that the Ban also violates the Equal Protection Clause, the Due Process Clause, and the Commerce Clause, this Note focuses solely on the First Amendment claim.[58]

C. The Ban

The NY Ban was passed in 1997 in response to the widely criticized violence of MMA fights in the United States.[59] At the first UFC fight, for example, one fighter kicked the other fighter squarely in the mouth. The match ended because the man responded by biting the

[50] *See id.* (describing how fighting arts are taught to students and passed on through demonstrations and actual live fights).
[51] *Id.* at 389 (explaining "vale tudo" is Portuguese for "anything goes").
[52] *See id.* (describing prominence of Gracie family worldwide).
[53] *See id.* (emphasizing that this fight single-handedly changed the landscape of MMA in United States).
[54] *See id.* at 390 (explaining that first Ultimate Fighting Championship event in 1990s brought Gracie family's tradition of Brazilian Jiu-Jitsu to United States).
[55] *See* Kim, *supra* note 7, at 51 ("The first tournament featured a kickboxer, a savate fighter, a karate expert, a shootfighter, a sumo wrestler, a professional boxer, and Rorion's [Gracie] younger brother, a Brazilian Jiu-Jitsu black belt named Royce Gracie.").
[56] *See Jones v. Schneiderman*, 974 F. Supp. 2d 322, 331 (S.D.N.Y. 2013) (describing plaintiffs comprised of amateurs and professional fighters and participants and claiming NY Ban on combative sports violates First Amendment guarantee of free speech because MMA live performances are symbolic conduct, suppression of which violates right to speak freely).
[57] *See id.* at 333-40 (arguing MMA live performances are (1) intended to communicate and (2) understood by reasonable viewers as communicating the intended message, therefore satisfying *Spence* symbolic conduct test).
[58] *See id.* at 327 (including other constitutional arguments included in Complaint).
[59] *Id.* at 328. *See also* N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (banning combative sports in response to political and media pressure to shut down violent events).

opponent's foot and losing his teeth, which were stuck in his opponent's foot.[60] In addition to prohibiting combat sports, the NY Ban also forbid the issuance of licenses to allow such sports to be conducted on an event-by-event basis.[61] The NY Ban defines "combative sport" as any professional match in which "contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents."[62] The definition explicitly excludes boxing, sparring, and martial arts.[63] Therefore, the law allows a professional match or exhibition of martial arts so long as it is a professional match sanctioned by an organization listed in the provision, including such groups as the U.S.A. Karate Foundation and the U.S. Judo Association.[64]

III. BACKGROUND

A. Relying on *Spence v. Washington*

In 1974, the United States Supreme Court struck down a Washington improper use statute that banned the display of a United States flag that had been altered in *Spence v. Washington*.[65] In *Spence*, a man attached a peace symbol to a United States flag and hung it outside of his college dorm room to protest the Vietnam War.[66] The Court explained that the improper use statute violated the student's right to exercise free speech guaranteed by the First Amendment.[67] The Court held that the First Amendment protects symbolic conduct as a form of speech.[68] Conduct is symbolic if: (1) the actor intends the conduct to be communicative, and (2) a reasonable observer would understand what the actor intended to communicate through that conduct.[69] There must be "an intent to convey a particularized message" and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[70] In *Spence*, the Court found that the act of altering the flag was so explicit that no reasonable person walking by the display would fail to understand that he was politically

[60] *See* Maher, *supra* note 39, at 240-241 (presenting analysis of why MMA is no longer as dangerous as it was in the 1990s).
[61] *See* N.Y. UNCONSOL. LAWS § 8905-(a)(2) (McKinney 1997) (banning not only events, but issuance of licenses in specific instances as well).
[62] *Id.* § 8905-(a)(1) (defining "combative sport").
[63] *See id.* (explicitly stating boxing, sparring, and martial arts are not banned).
[64] *See id.* (providing exception where specific martial art form is sanctioned by recognized organization). The recognized organizations listed in the NY Ban are: "U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc. World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, [and] World Wide Kenpo Association." *Id.*
[65] *See* Spence v. Washington, 418 U.S. 405, 412-13 (1974) (establishing two part symbolic conduct test to determine when conduct is subject to First Amendment protection).
[66] *See id.* (providing analysis for symbolic conduct cases involving protected speech).
[67] *See id.* at 414 (holding statute as-applied to flag display violated Amendment guarantee of free speech).
[68] *See id.* at 410 (defining symbolic conduct).
[69] *Id.* at 414-415 (holding statute violated First Amendment and infringed on individual's right to express opinion by displaying flag with peace symbol on it). Based on the historical context of this flag display, "it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." *Id.* at 410.
[70] *Id.* at 410-411 (explaining context is useful in determining symbolic nature of conduct). "[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Id.*

protesting the Vietnam War.[71] Today, courts rely on the *Spence* test to determine whether the First Amendment protects different types of conduct.[72]

If conduct *is* expressive, a court may still regulate it if the state interest is sufficient.[73] If a court determined MMA *was* symbolic conduct, the four-part *O'Brien* test would apply to determine whether a government regulation, despite infringing on free speech, is in some way justified.[74] Because MMA conveys an understandable message, it falls within the purview of the First Amendment, and therefore the NY Ban is subject to the *O'Brien* test.[75]

B. American MMA: The Controversy

Even with a showing that MMA fights are symbolic speech under *Spence*, a court will not strike down the NY Ban if it serves a strong state interest.[76] Therefore, a crucial component to challenging the NY Ban is showing MMA fights are not so dangerous that the NY Ban is needed for safety reasons.[77] There are several factors that demonstrate that MMA fights are significantly safer today than they were in the 1990s or as New York legislators still *think* they are today.[78] These factors include the rise of highly comprehensive rules and regulations, the consent of the participants, and the lack of animosity between the fighters.[79] Coupled with the protected message of self-evolution and tradition that provides the foundation for MMA, these safety measures show that MMA is much more than a physically violent fight.[80]

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[71] *See id.* (explaining significance of symbols in expressing speech).

[72] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, at *6 (S.D.N.Y. 2013) (applying *Spence* test to MMA live performances).

[73] *See* United States v. O'Brien, 391 U.S. 367, 380-82 (1968) (emphasis added) (establishing four part test to determine whether government may regulate protected speech, essentially asking whether there is strong enough government interest to justify infringing on constitutionally protected rights of free speech).

[74] *See id.* (emphasis added) (considering when content-based regulation passes strict scrutiny). The *O'Brien* Court held that once conduct has been deemed speech subject to First Amendment protection, a government's regulation of that speech must satisfy four factors to be constitutional. *Id.* Symbolic conduct can only be regulated by the government if the regulation (1) is within the constitutional power of the government, (2) furthers an important or substantial government interest, (3) the interest is unrelated to the suppression of free expression and (4) the incidental restriction on speech is no greater than necessary to further the interest. *Id.*

[75] *See id.* This article focuses on the *Spence* test stage of First Amendment jurisprudence, however, and takes the position that mixed martial arts live performances satisfy both elements and therefore are subject to First Amendment analysis. *See Spence*, 418 U.S. at 412-13 (providing two part test to determine whether conduct is symbolic and therefore subject to First Amendment analysis).

[76] *See Jones*, 2013 WL 5452758, at *9 (granting motion to dismiss First Amendment challenge to NY Ban on combative sports). New York justified the NY Ban as needed to mitigate the excessive violence of MMA. *Id.*

[77] For a discussion presenting an alternative argument for future plaintiffs to argue NY Ban violates the First Amendment free speech guarantee, extended to symbolic conduct through *Spence v. Washington*, see *infra* note 138 and accompanying text.

[78] *See* Maher, *supra* note 39, at 229-234 (emphasis added) (presenting analysis of why MMA is no longer as dangerous as it was in the 1990s).

[79] *See id.* at 217-19 (providing three factors that make MMA less dangerous and why it should be sanctioned by states). These three factors are: (1) MMA competitors acquire cross-disciplinary skills, (2) rules make the matches more exciting because people are rarely seriously injured and so the fights go on, and (3) rules make fights more favorable with legislators and regulators. *Id.* at 217-19. These factors have transformed MMA from a bloody spectacle into a "rule-bound sport deserving of official sanction." *Id.* at 218.

[80] *See id.* (explaining factors rendering MMA less dangerous than it was in 1990s).

1. Regulations and Rules

MMA has developed and implemented extensive regulation since 1997 and therefore violence provides little rationale for banning MMA.[81] As a result of concerns in the 1990s over the excessive danger involved in "no-holds barred" cage fighting, the UFC and other promotional organizations worked with the states to develop rules and regulations in an effort to save MMA from extinction.[82]

Today, MMA represents an interesting duality: it is one of the most commercially promoted sports in the United States, but also one the most heavily regulated.[83] This is precisely why some states refused to ban MMA fights and even actively sanctioned them, as Nevada did in 2001.[84] While the existence of these rules and regulations does not provide an argument supporting a First Amendment claim, it does demonstrate that the state has no counter-argument for regulating MMA to mitigate violence if a court agrees there is protected speech involved.[85] Most notably, the rules and regulations legitimize MMA as a highly skilled sport worth protecting.[86]

Prompted by threats to ban UFC fights in the 1990s, the rules and regulations specifically address several factors, including: safety of the athletes, fairness in the fights, and unprofessional relationships between fighters and promoters, managers, and regulatory agencies.[87] The rules and regulations addressing violence and danger are the most relevant to the MMA First Amendment discussion.[88] The rules are comprised of the actual MMA Rules, as well as regulations that ban performance-enhancing drugs, and discretionary safeguards controlled by regulators and doctors.[89] The rules of the sport "define the contours of MMA and distinguish it from anything-goes brawling."[90] The Unified Rules of MMA, which vary by state but look

[81] *See id.* at 218 (explaining role of rules in legitimizing MMA fights); *see also* UNIFIED MMA RULES, *supra* note 14 (providing complete version of Unified MMA Rules).

[82] Berger, *supra* note 11, at 396-97 (explaining how rules were direct response to criticism, threats of prohibition); *see also* Maher, *supra* note 39, at 230 (categorizing rules and regulations into three conceptual categories). Maher conceptually places rules and regulations into those concerning (1) fighter safety, (2) fairness in fights, and (3) constraining relationships amongst players in MMA regulatory structure. *Id.*

[83] *See* Berger, *supra* note 11, at 396-97 ("Today, through the efforts of various MMA promoters and enthusiasts, the sport has gained acceptance and sanctioning approval in almost every state."); *see also* Maher, *supra* note 39, at 241 ("Flourishing within a cradle of sensible regulation, MMA is rapidly becoming an accepted part of the American sporting landscape.").

[84] *See* Maher, *supra* note 39, at 218 ("By the late 1990s, promoters believed that the sport's survival depended on persuading sport regulators in New Jersey and Nevada that MMA had progressed from a no-rules spectacle to a rule-bound sport deserving of official sanction.").

[85] For a discussion of why MMA is protected by the First Amendment, see *infra* notes 138-157 and accompanying text.

[86] *See* Maher, *supra* note 39, at 230 (explaining in depth evolution of state-based rules and regulations surrounding MMA fights).

[87] *See id.* at 230 (describing "three broad substantive categories" of rules and regulations of MMA fights).

[88] *See id.* (describing all levels of rules and regulations which protect fighters in MMA live fights). Remember the second prong of *Spence* – even if the violence is not actual, if it appears to viewers that fighters and trying to inflict serious harm on the opponent, then the plaintiffs fail the second prong since a reasonable viewer does not understand the communicative nature of the fights. *Id.*

[89] *See id.* (explaining rules and regulations that ensure safety of participant athletes). Discretionary safeguards put authority in the hands of doctors and regulatory agencies to keep a person from participating in a fight if he or she is either not healthy enough or for some other reason is more likely to get hurt. *Id.*

[90] *Id.* (providing best example of these rules is New Jersey's Mixed Martial Arts Uniform Rules of Conduct).

similar in states where MMA is prevalent, promulgate the format of a live fight, the structure of time, the procedure and equipment used, and the permissible fighting techniques.[91] Most significantly, the Rules prohibit the use of maneuvers that are particularly violent and likely to inflict serious injury, such as biting, groin strikes, and grabbing for the eyes.[92] Interestingly, these rules are also meant to allow only those fighting methods that require great practice and skill, contributing to the nature of the fight as sport; the fighting methods are no longer the barbaric spectacle of the 1990s.[93]

Lastly, drug prohibitions and discretionary safeguards ensure that only healthy, highly trained, and informed athletes participate.[94] State athletic commissions have discretion to grant fighters licenses to compete, and doctors are also involved in granting these licenses.[95] Medical experts state, "MMA is as safe as or safer than many sports that are not only legal in New York, but are wholly unregulated and often actively promoted by the State."[96] Some critics of the NY Ban argue there are equally violent sports – such as football and ice hockey – that are not only legal in New York, but also actively promoted by the state.[97] While New York does not have these particular safeguards for MMA in place, the states that do have them demonstrate an alternative to banning MMA while still mitigating violence.[98]

C. The Professional Combative Sports Ban[99]

While some states decided to address the problem of violence in MMA by imposing strict rules and regulations, others took the route of complete prohibition.[100] This is what the state of New York decided to do in 1997.[101] New York passed the Ban at a time when MMA was in its infancy in the United States and there was very little regulation surrounding fights and performances.[102] Therefore, the Ban made sense at this time because the lack of rules and

[91] *See id*. (explaining that "[s]tates with significant MMA such as Nevada, California, and Ohio have adopted near-identical rules of sport" to those adopted by New Jersey in 2001); *see also* UNIFIED MMA RULES, *supra* note 14 (providing example of rules, which vary by state but are nearly identical, which govern MMA fights).
[92] *See id.* at 231 (discussing role of rules in making MMA less dangerous than in 1990s); *see also* UNIFIED MMA RULES, *supra* note 14 (regulating weight, equipment, judging, fouls, etc.).
[93] *See* Maher, *supra* note 39, at 231-232 ("The obvious rationale for such rules is that they protect athlete safety while still permitting skillful and dramatic contests.").
[94] *See id*. at 232 ("[T]here is an important group of MMA safety regulations that are discretionary in a very particular way: they substitute the judgment of an expert actor for that of the fighter, regarding the fighter's fitness for participation in MMA activity.").
[95] *See* Maher, *supra* note 39, at 233 (describing California's model of discretionary safeguards, similar to other states which sanction MMA). In the sixteen years MMA has been in the United States, one death has occurred as the result of a fight. *Id.* "Available evidence and considered examination reveal . . . that MMA is vastly less dangerous than it is perceived by critics to be." *Id.*
[96] *Id*. at 5 (explaining that other states not only allow, but also support MMA live performances, unlike NY).
[97] *See* Second Amended Complaint, *supra* note 12, at 5 (describing NY Ban).
[98] *See, e.g.*, Maher, *supra* note 39, at 233-34 (using California's discretionary safeguards model to show how such a regulatory structure protects the fighters and mitigates violence in MMA).
[99] *See* N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (banning live performance MMA, amongst other "combative sports" in New York).
[100] *See id.* (providing language of NY, one such state, law against combative sports, targeting MMA in particular).
[101] *See id.* (affecting MMA matches and exhibitions, but not expressly identifying MMA as specifically banned).
[102] *See* Second Amended Complaint, *supra* note 12, at 9 (claiming original rationale for NY Ban no longer makes sense since there are so many regulations surrounding UFC fighting today). This is part of the reason people were generally skeptical of MMA upon its arrival to the United States; it looked violent, and without any rules, it was

regulations made MMA appear inherently violent.[103] In light of today's comprehensive regulation of MMA, the NY Ban addresses danger that is no longer allowed in the fights. The MMA of 1997 is empirically different than the MMA of 2014.[104]

The New York Athletic Commission, the agency responsible for enforcing and legitimizing the NY Ban, has some discretion in revising the list of martial arts exceptions.[105] The Commission must establish a systematic process for determining whether to add or remove a given fighting form from the list of exceptions, including but not limited to: establishing that its purpose is self-defense, there are rules of protection, and there is protective equipment used in fights.[106] Interestingly, the plaintiffs were successful in their claim that the NY Ban is unconstitutionally vague.[107] The argument succeeded because of the vague language granting such discretion to the Commission to play favorites with martial arts organizations.[108]

Initially, the NY Ban was not widely criticized because it responded directly to the inherent violence of an unregulated and spectacular fighting fad that had caused outrage and controversy in the 1990s.[109] However, the spectacle of MMA quickly evolved into a sophisticated and highly regulated sport.[110] This transformation all began when Zuffa LLC, the current owners, bought the UFC in 2001 and began developing comprehensive and strict rules and regulations to curb violence, to protect fighters, and to appease critics.[111] Protective measures transformed MMA from no-holds barred cage fighting into a highly regulated sport that teaches mental, physical, and spiritual development to participants and viewers, effectively mitigating the violence of MMA in the 1990s.[112]

IV. NARRATIVE ANALYSIS: *JONES* FIRST AMENDMENT ARGUMENT

incredibly dangerous. *Id.* This sentiment and fear simultaneously gave rise to comprehensive rules and regulations as well as to the NY Ban. *Id.*

[103] *See* Kim, *supra* note 7, at 50-53 (explaining that "[t]here were no weight classes and essentially anything was allowed except eye-gouging, biting, and groin strikes" when MMA first came to United States in 1990s).

[104] For a discussion of why the rules and regulations that permeate MMA fighting mitigate the violence (violence is said to justify NY Ban), see *supra* notes 81-98 and accompanying text (exploring role of rules and regulations in curbing violence of MMA).

[105] *See* N.Y. UNCONSOL. LAWS § 8905-(a) (McKinney 1997) (banning combative sports events in New York).

[106] *See id.* (describing process by which the commission may add or exclude styles of martial arts from listed exceptions to prohibition).

[107] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, at *13 (S.D.N.Y. 2013) (denying motion to dismiss only regarding as-applied vagueness Due Process claim).

[108] *See id.* Even though the motion to dismiss was granted for every other claim, the District Court agreed that plaintiffs had successfully plead vagueness in the Ban by being so unclear about which martial arts can be exhibited live and which cannot. *Id.*

[109] *See* Mac Green, *UFC vs the Big Apple*, THE SPORTS LAW CANARY (Dec. 2, 2013), http://sportslawnews.wordpress.com/2013/12/02/ufc-vs-the-big-apple/ (describing reason for NY Ban, *Jones* Complaint, and possibility that *Jones* plaintiffs could succeed in appealing District Court's granting defendants' motion to dismiss First Amendment claim).

[110] *See id.* (expressing optimism for appeal of First Amendment claim); *see also* UNIFIED MMA RULES, *supra* note 14 (providing strict rules to keep MMA fights safe and fair).

[111] For a discussion of the relevant rules and regulations of MMA, see *supra* notes 81-98 (exploring rules and regulations and how they curb violence).

[112] For a closer look at how plaintiffs can argue MMA is protected under the First Amendment, see *infra* notes 138-157 and accompanying text (exploring one way to convince District Court MMA conveys a protected message and viewers understand this message); *see also* Green, *supra* note 109 ("New York's law is outdated, written at a time when MMA was a very different sport.").

Relying on *Spence*, the *Jones* plaintiffs argued that MMA is symbolic conduct and therefore protected under the First Amendment.[113] As discussed above, the *Jones* plaintiffs cleared the first *Spence* hurdle and convinced the district court that MMA performances are intended by all players involved to send a message.[114] They achieved this by proposing that MMA live performances constitute symbolic conduct because they are live entertainment.[115] The plaintiffs explained that "[l]ive Professional MMA matches provide fighters with myriad expressive outlets, allowing fighters to build relationships with their fans and tell the world their story."[116]

Further, the plaintiffs argued that fans come to hear these stories, to learn from them, and to then tell their own stories through MMA.[117] In fact, live-performance MMA is structured in a way that channels the stories of the fighters through the event to the viewers.[118] This design includes things like videos played before the fights, blogs written by the fighters in anticipation of the events, and press conferences highlighting a fighter's history.[119] Specifically, plaintiffs argued that "[p]rofessional MMA has a rich tradition of athletes using this period of the live event to its full expressive potential."[120] The argument failed because the District Court found that while there may be such expression involved in MMA fights, the average viewer does not understand this message.[121] Consequently, the Plaintiffs had failed to pass the second prong of *Spence*.[122]

Applying *Spence* to MMA fights is difficult since there is no political speech involved in fights.[123] Courts have time and again held that political speech is at the core of First Amendment protection.[124] The District Court in *Jones* applied the *Spence* test and found that MMA live performances pass the first prong since the fighters intend to convey a message by fighting.[125]

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[113] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, at *9 (S.D.N.Y. 2013) (granting motion to dismiss First Amendment claim that NY Ban violates constitutional guarantee of free speech). The District Court accepted *Spence* as the appropriate line of inquiry for symbolic conduct. *Id.*

[114] *See* Maher, *supra* note 39, at 219-20 (explaining roles of four key players in professional MMA: professional athletes, managers and agents, promotional organizations, and regulatory officials).

[115] *See generally* Second Amended Complaint, *supra* note 12 (arguing *inter alia* that NY Combative Sports Ban violates First Amendment because live performance MMA is symbolic conduct under *Spence*).

[116] *Id.* at 221 ("The expression in these live events begins far outside the cage, is carried into it, and continues when the fighters exit. Live Professional MMA has, over the years, developed its own unique pageantry and tradition.").

[117] *See id.* ("Many fans come for this complete story"); *see also Jones*, 2013 WL 5254758, at *4 (explaining MMA fighters are both fighters *and* performers).

[118] *See* Second Amended Complaint, *supra* note 12, at 226 (describing how fighters and viewers prepare for MMA live performances).

[119] *See id.* (explaining role of videos, blogs, etc. in MMA live performances).

[120] *Id.* at 230 ("Fighters have used this time to entertain the audience, show *who they are and what they believe in*, and send other messages as they feel the need.").

[121] *See Jones*, 2013 WL 5452758, at *9 (dismissing complaint as to First Amendment challenge to NY Ban).

[122] *See* Spence v. Washington, 418 U.S. 405, 412-13 (1974) (holding that conduct is only protected by First Amendment if it is intended as communicative message *and* reasonable viewer understands this message) (emphasis added).

[123] *See Jones*, 2013 WL 5452758, at *8-9 (rejecting plaintiffs' argument that protected message of MMA is entertainment).

[124] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 421 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. *Core political speech* occupies the highest, most protected position . . . .") (emphasis added).

[125] *See Jones*, 2013 WL 5452758, at *6 (holding *Spence* first prong passed).

However, the court rejected the possibility that plaintiffs would be able to meet the reasonable viewer standard, and therefore granted the defendant's motion to dismiss.[126]

Because the court in *Jones* already determined that MMA fights have an intended message, future plaintiffs do not need to worry about convincing a court that it is symbolic despite its non-political nature.[127] Ultimately, the second prong of the *Spence* test applies to symbolic conduct cases, so whatever the intended message is, a court must determine that a reasonable viewer would understand it.[128] The plaintiffs failed to pass the second prong because they did not adequately illustrate the true message of MMA to the District Court and consequently the court found no reasonable viewer would understand there was a message at all.[129] A successful argument requires an articulate depiction of MMA's culture and tradition and why the First Amendment protects the right to share this tradition with viewers.[130]

V. CRITICAL ANALYSIS: AN ALTERNATIVE FIRST AMENDMENT ARGUMENT

Spence established the two-part test for courts to determine whether conduct is communicative.[131] It is the second part of the test that led the District Court in *Jones* to grant the defendants' motion to dismiss.[132] The court explained that although the intent of the communicator is important, there is an objective component that requires consideration of whether, under the circumstances, the particular conduct is likely to be understood or perceived as expressing a particular message.[133] The plaintiff bears the burden of proving this.[134]

This reasonable viewer standard is where future plaintiffs must make a stronger argument to obtain their day in court.[135] The *Jones* plaintiffs failed in part because the court concluded that they did not carry their burden of demonstrating "more than a mere plausible contention that viewers are likely to perceive live, professional MMA as conveying the alleged expressive

[126] *See id.* at *7 (holding *Spence* second prong failed).
[127] *See generally R.A.V.*, 505 U.S. 377, 422 (explaining political speech is held as most valuable form of speech by courts).
[128] *See Spence*, 418 U.S. at 411 (providing two prong symbolic conduct test).
[129] *See Jones*, 2013 WL 5452758, at *9 (dismissing complaint as to First Amendment challenge to NY Ban).
[129] *See id.* at *8 ("Music, dance, and theatrical performance are protected because, whether amateur or professional, slap-stick or high-society, such activities are primarily intended to express a message to the viewer. Live professional MMA, by contrast, lacks such essential communicative elements.").
[130] *See id.* (holding plaintiffs failed to plead reasonable viewer likely to understand message behind MMA).
[131] *See generally Spence*, 418 U.S. 405 (providing two-prong symbolic conduct test).
[132] *See Jones*, 2013 WL 5452758, at *9 (granting motion to dismiss because plaintiffs failed to show reasonable viewer understands intent of performances).
[133] *See Jones*, 2013 WL 5452758, at *6 (quoting Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139, 146 (N.D.N.Y. 2006)).
[134] *See id.* (granting motion to dismiss First Amendment claim in reference to MMA live performances); *see also* Texas v. Johnson, 491 U.S. 397 (1989) (holding symbolic conduct protected by First Amendment and explaining context is indicative of symbolic nature of conduct).
[135] *See Jones*, 2013 WL 5452758, at *7 (finding pleading regarding second prong *Spence* test failed).

messages."[136] Because the court held that MMA performances fail the *Spence* expressive conduct test, it is not necessary to explore whether the state can regulate the performances.[137]

A. The First Prong: The Message

The plaintiffs in *Jones* argued that live performance MMA is "clearly intended and understood as public entertainment and, as such, is expressive activity protected by the First Amendment."[138] They might have succeeded had they argued that the message is something more expressive than "entertainment."[139] Further, the plaintiffs' complaint focused in large part on fighters using MMA live performances to express themselves, *their* views, and to tell *their* stories.[140] However, one might argue that MMA itself is a story, and consequently convince the court that banning the art itself, as opposed to the fighters performing, silences protected speech.[141]

The history and tradition that gave rise to modern day MMA is so rich and convergent of many different views, that prohibiting people from sharing the art form is a violation of the First Amendment.[142] A successful argument must include a demonstration that MMA performances manifest a lifestyle, which allow participants to share what they believe to be true – i.e. by practicing certain techniques and sharing them with others, they are able to express who they are.[143] The court in *Jones* indicated this by emphasizing the fights, while perhaps expressive, do not adequately convey this message to viewers.[144] To do so, future plaintiffs must demonstrate

[136] *Id.* The Court emphasized that in drawing this conclusion, it did not make an "esthetic or moral judgment regarding MMA." *Id.* (referring to Court's similar caution to steer clear of state paternalism in case regarding violent video games in Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729 (2011)).

[137] *See generally Jones*, 2013 WL 5452758 (holding MMA live performances are not symbolic conduct subject to First Amendment protection).

[138] Jones v. Schneiderman, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (granting defendant's motion to dismiss as to due process and equal protection claims). The Court in 2012 held that if, as plaintiffs argued, the ban no longer met a rational basis standard, its source of remedy was with the legislature, not the judiciary. *Id.* at 431; *see also* Richard Sandomir, *UFC Sues State Over Ban on Mixed Martial Arts Bouts*, N.Y. TIMES, Nov. 15, 2011, at B18, *available at* http://www.nytimes.com/2011/11/16/sports/ufc-sues-to-lift-new-york-ban-on-mixed-martial-arts-fighting.html?_r=0 (referring to 2012 *Jones v. Schneiderman* decision to grant motion to dismiss in part).

[139] *See* Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2742 (2011) (held video games qualify for First Amendment protection and California failed to meet strict scrutiny burden for content-based regulation). Their argument suffered because they relied on *Brown v. Entertainment Merchant Association*, which struck down a California law banning the sale of violent video games to minors, a case that is barely relevant to MMA fights because its outcome was mainly based on the fact that it targeted minors. *Id.*

[140] *See* Second Amended Complaint, *supra* note 12, at 230 (emphasis added) (explaining message communicated through MMA live performances).

[141] *See id.* at 240 (claiming that fans "also appreciate the artistry displayed by the fighters"). Plaintiffs had the information needed to argue that MMA is more than entertainment, and involves art and tradition, but they did not take this route, thereby failing the second prong of *Spence*. *Id.*

[142] *See* Mamet, *supra* note 12, at 1 (expressing value of MMA in United States and how it is just like other sports in terms of value). "[I]n the United States we, in our sports, have had affection for the notion of whacking the other guy in the head and taking his possessions (basketball), land (football) or consciousness (boxing) away from him. That's what we like." *Id.*

[143] *See id.* at 2 (explaining that in MMA, "capitalism meets globalism").

[144] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, at *9 (S.D.N.Y. 2013) (holding *Spence* test second prong failed); *see also* Spence v. Washington, 418 U.S. 405 (1974) (providing two part symbolic conduct test).

that performances are symbolic conduct under *Spence v. Washington*.[145] Next, they must show that the NY Ban is a content-based regulation on expressive conduct and is therefore subject to strict scrutiny under First Amendment jurisprudence.[146] The state would then have the burden to prove a compelling state interest that is narrowly tailored.[147]

B. The Second Prong: Reasonable Viewer Standard

The District Court already accepted that live performance MMA is communicative under *Spence*, thereby paving the way for a future argument to pass the first prong.[148] However, the court rejected the plaintiff's argument that a reasonable viewer understands what this message is.[149] To demonstrate a reasonable viewer *does* understand the message of MMA, it is important to understand why the live fights are so popular, and what observers see as the benefit.[150] Ed Parker, a world-renowned American martial artist and grandmaster of Kenpo Karate, described the teaching of martial arts not as an exhibition, but as an exchange.[151] He once said to a student, "I am not going to *show* you my art. I am going to *share* it with you. If I *show* it to you it becomes an exhibition . . . [b]ut by *sharing* it with you, you will not only retain it forever, but I, too, will improve."[152] Joe Hyams, a student of Ed Parker, explained similarly that these types of arts are learned through experience.[153] Within these stories, the key to survival of the *Spence* second prong can be found.[154]

Live fights are an integral part of MMA, without which the mixed fighting style would cease to exist, at least as a safely regulated and legitimate sport.[155] "It's what I enjoy doing. It's what I'm into. I'm going to continue to do it no matter if it does become legal in New York or not."[156] The live nature of the fights are clearly a crucial part of MMA and those who view the

[145] *See Spence*, 418 U.S. at 412-13 (holding conduct to be symbolic if (1) actor intends to communicate through the conduct and (2) a reasonable viewer is likely to understand the intended message).
[146] *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (creating four part test to determine whether government may regulate symbolic conduct based on its content without violating First Amendment free speech clause).
[147] *See id.* (holding content-based regulations subject to strict scrutiny).
[148] *See Jones*, 2013 WL 542758, at *6 (holding MMA live performances pass first prong of *Spence* test since UFC and fighters intend to communicate a message through the fights).
[149] *See id.* (holding plaintiffs failed to demonstrate "great likelihood" reasonable viewers understand message of MMA).
[150] *See Spence*, 418 U.S. at 412-13 (providing reasonable viewer standard).
[151] *See* JOE HYAMS, ZEN IN THE MARTIAL ARTS (Bantam Books 1979) (exploring true message of martial arts and spiritual nature which permeates all styles).
[152] *Id.* at 4 ("If I *show* it to you it becomes an exhibition, and in time it will be pushed so far into the back of your mind that it will be lost. But by *sharing* it with you, you will not only retain it forever, but I, too, will improve."). In martial arts, the teacher is also the student and the student learns through this constant exchange, practice, and observation. *Id.* It is crucial, therefore, to the heritage of martial arts that it can be practiced live and within access of those who wish to learn. *Id.*
[153] *See id.* (noting that Joe Hyams studied under Ed Parker).
[154] *See Spence*, 418 U.S. at 412-13 (requiring that reasonable person understand message behind MMA fights).
[155] *See* HYAMS, *supra* note 151 (articulating that live fights are how MMA is taught); *see also* Berger, *supra* note 11, at 388 ("Not a philosopher or even much of a thinker like his teacher, Maeda exhibited his knowledge of judo the best way he knew how – *in actual competition*.") (emphasis added).
[156] *Id.* (quoting Jonathan Rodriguez, 22, a "self-described 'nobody' in New York's underground scene . . . who loves to fight").

fights still come to learn and to admire the strength and prowess of practitioners.[157] The highly publicized and well-attended larger fights are an opportunity for aspiring MMA fighters, students of other art forms, and plenty of other people inspired by the physical and mental stamina of the fighters, to learn from a live demonstration of these skills.[158]

The value of the fights is only half the argument, which the District Court in *Jones* already established is consistent with MMA.[159] The second half under *Spence* is that reasonable viewers understand the message of these fights.[160] In *Spence*, the Court concluded the reasonable person prong was met since any passerby could tell the peace sign on the flag was a message of political protest.[161] Here, the reasonable viewer is not a casual bystander as was the case in *Spence*, where the flag was displayed on a public street.[162] Instead, the reasonable viewer is a paying fan; someone who comes to an MMA fight because he or she at least minimally understands the rules of MMA and knows it is about endurance, technique, tradition, and stories of victory.[163]

This reasonable observer knows the fights are not inherently about violence.[164] As one fan said, "fists aren't metaphors."[165] The fights provide a demonstration of physical and mental will power, which compile the fighters' journeys as athletes and their ability to overcome limitations.[166] Not only is this the message behind MMA, but also the reason why many people come to watch matches.[167] In harmony with the rationale behind *Spence*, there *is* a message

[157] *See id.* (describing why fights still occur despite MMA Ban).
[158] *See* Gross, *supra* note 2 (discussing danger inherent in unregulated MMA fights).
[159] See Spence v. Washington, 418 U.S. 405, 412-13 (1974) (articulating second prong of symbolic conduct as need for reasonable viewer to understand message expressed by conduct).
[160] *See id.* at 415 (explaining that any reasonable viewer would understand flag was political protest). "[H]is message was direct, likely to be understood, and within the contours of the ***First Amendment***." (emphasis in original). *Id.*
[161] *See id.* "A flag bearing a peace symbol . . . might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point . . . ." *Id.* at 410.
[162] *See generally* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758 (S.D.N.Y. 2013) (holding MMA not protected by First Amendment). The reasonable viewer in the context of MMA is the average person who pays to see a show. *Id.* Because the matches are not open to the public and the only way someone can view the match is to pay, the reasonable viewer is the spectator, rather than an average non-spectator. *See generally* Second Amended Complaint, *supra* note 7 (explaining that fans are the ones who matter and that they *do* understand the message of MMA). However, the plaintiffs in *Jones* could make this argument more easily if they argued the message was more than just entertainment. *Id.*
[163] *See generally* Second Amended Complaint, *supra* note 7; *see also generally* Maher, *supra* note 39 (describing what MMA matches are like and how they have evolved into a legitimate sport).
[164] *See* Chuck Mindenhall, *Fifty reasons to Love Mixed Martial Arts*, ESPN (Jan. 1, 2013, 2:58 PM), http://espn.go.com/blog/mma/post/_/id/15891/50-reasons-to-love-mma (providing reasons why people watch MMA).
[165] *See* Maher, *supra* note 39, at 222 ("Societies have long prized valor and physical competition . . . [b]ut sport is more than enjoyable exertion; it is also competitive, goal-oriented and rule-bound.").
[166] *See id.* at 222-223 (explaining utility of combat sports, in particular multidisciplinary MMA, for spectators). Maher explained that MMA had a historical purpose of preparing military combatants and while today there is lesser value on civilian military training than there was thousands of years ago, there is still utility in training people in self-defense. *Id.*
[167] *See* Mindenhall, *supra* note 164 (providing example of loyalty of MMA fans and that it is more than fascination with violence). "So many people are fair-weather fans in other sports because they don't like the formality of losing. In MMA, fair-weather fans are rare." *Id.*

within MMA and because fans come to partake in the awe of athletic greatness, the NY Ban unconstitutionally impinges on free speech.[168]

VI. IMPACT

Because these fights are such a vital component of MMA, they occur despite the NY Ban.[169] The most prominent of these MMA groups is the Underground Combat League ("UCL").[170] UCL promoter, Peter Storm explained, "[t]he truth is…[n]obody is fighting on rooftops, throwing each other through glass. None of that stuff. It's guys who are mixed martial artists based out of New York, and what they want to do is test their skills on a level playing field where, if they feel they can do well, they progress."[171] Further, these fights allow MMA athletes to share their passion for fighting with other fighters and with fans.[172] The danger of course, is that the bare bone UCL regulations are nothing like state-sanctioned, Athletic Commission enforced rules.[173] For example, there are no weight categories in the UCL, creating an obvious danger for smaller weight-class fighters, nor do doctors closely examine fighters before and after fights as they do in states where MMA is legal.[174]

The plaintiffs in *Jones* successfully pled that the NY Ban violates the Due Process Clause since the language of the statute is vague.[175] However, if the outcome of this case rests on an as-applied vagueness argument, it will be easy for states to ban MMA fights by simply writing a linguistically specific statute.[176] For this reason, it is crucial to the survival of MMA *as a legitimate sport* that plaintiffs also pursue a First Amendment claim.[177] The argument that MMA

[168] *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, **7 (S.D.N.Y. 2013) (holding no First Amendment protection because MMA is not inherently expressive and thus does not implicate first amendment concerns). Additionally, the court's reasoning for granting in part, and denying in part the Defendant's motion to dismiss is that MMA is not specifically intended to convey a message to those viewing the fight. While those who know what it takes to participate in MMA fights will undoubtedly receive or interpret certain messages from watching MMA fights such as those of technique or skill, MMA itself was not created nor is specifically performed to convey a particularized message to the viewer as is the case with other activities such as dancing. In addition to this, the court says, "Even in assuming that MMA fighters intend to convey a particularized message, the court is not convinced that there is a great likelihood that the particularized message will be understood by those viewing it." *See* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, *9 (S.D.N.Y. 2013) (holding no First Amendment protection because plaintiffs failed to argue MMA's message not understood by spectators).

[169] For a brief discussion of the nature of these fights, see Gross, *supra* note 2 (discussing danger inherent in unregulated MMA fights).

[170] *See* Gross, *supra* note 2 (describing dangerous nature of MMA fights as they currently are in New York, absent regulation because they occur despite the MMA Ban).

[171] *Id.* (explaining it is not like Fight Club, as many non-fans think).

[172] *See id.* (sharing fighting with fans allows fighters to convey message they find within MMA). "It provides a service to fans and fighters alike because it gives them a taste of what mixed martial arts competition is." *Id.*

[173] *See id.* (providing reasons why New York should legalize MMA).

[174] *See id.* (comparing New Jersey, where there are strict rules requiring presence of EMTs at fights and both pre-fight and post-fight medical examinations).

[175] *See generally* Jones v. Schneiderman, No. 11 Civ. 8215, 2013 WL 5452758, **24. (S.D.N.Y. 2013) (denying Plaintiff's motion to dismiss in part concerning Due Process as-applied vagueness argument).

[176] *See id at **12.* (granting motion to dismiss First Amendment claim). It is important to understand that the as applied vagueness claim does not keep states from banning MMA in the future. *Id.*

[177] *See id.* (granting motion to dismiss First Amendment claim sets precedent that the fights *are not protected* speech) (emphasis added to indicate that MMA still goes on in NY, but absent rules and regulation, it is extremely dangerous).

is excessively dangerous provides an even greater incentive for the State of New York to sanction live fights and heavily regulate them as other states have successfully done.[178]

There is already evidence of a rise in unregulated, underground, and ultimately very dangerous MMA fights.[179] Without the protection of state regulation, these underground fights will result in far greater harm than any state-sanctioned live fight could cause.[180] It can be demonstrated that these athletes and viewers equally value the ability to train, develop, and share the traditions that comprise modern day MMA.[181] The utility and influence of mixed martial arts in the United States is significant.[182] It is extensive and permeates not only different social groups, but throughout the United States government as well.[183] For example, the US military and law enforcement agencies use MMA not only for physical benefits, but for mental development as well.[184] The question for the appellate court in this case, and the district courts to hear similar arguments, will be: whether to protect this art form as speech under the First Amendment, or to ban it in the paternalistic and overreaching declared interest of decreasing violence.[185]

[178] For a discussion of the background and evolution of MMA rules and regulations, see *supra* notes 81-98 and accompanying text (explaining rules that emerged in response to criticism and prohibitions aiming to protect against violence).
[179] *See* Gross, *supra* note 2 (describing dangerous nature of MMA fights as they currently are in New York, absent regulation because they occur despite MMA Ban).
[180] *See* Maher, *supra* note 39, at 224 (providing statistics which indicate that despite fears and media discussions, there are historically very few fatalities resulting from UFC and other MMA fights).
[181] *See id.* at 222 (arguing that since MMA is less violent than many accepted sports in the United States and it is in many ways more legitimate, its value should be recognized and its practice protected).
[182] *See* Maher, *supra* note 39, at 222 (describing competitive nature of MMA fighting and "commitment to craft in pursuit of the maximum development of one's potential" as contributive to many Americans' lives).
[183] *See id.* (arguing that MMA is legitimate sport).
[184] *See, e.g.*, *Massive MMA Media Push Into the United States Armed Forces*, MIXED MARTIAL ARTS LLC, http://www.mixedmartialarts.com/news/375878/Massive-MMA-media-push-into-the-US-Armed-Forces/ (last visited Feb. 26, 2014) (demonstrating United States government's use of Mixed Martial Arts to train military personnel through Stripes MMA program). "The men and women of the U.S. military are among the most enthusiastic and loyal fans of MMA, and the sport of MMA and its athletes have always been great supporters of the military.. ." *Id.*
[185] *See id.* ("MMA is the fastest growing sport in the world and has a huge following within the U.S. military community").