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**FIRST AMENDMENT AS LAST RESORT: THE INTERNET
GAMBLING INDUSTRY’S BID TO ADVERTISE IN THE UNITED
STATES**

I. INTRODUCTION

Gambling is a business the Internet serves well. Web sites like BETonSPORTS.com and PartyPoker.com provide almost unlimited access to betting and gambling.¹ These Web sites and many others like them are operated from a variety of jurisdictions including Costa Rica, Britain, and countries in the Caribbean.² Although Internet gambling has existed for approximately ten years, many countries continue to struggle to apply traditional gaming laws to a medium whose jurisdictional issues challenge enforceability.³

In the United States, gambling is mostly left to the states to regulate or prohibit.⁴ However, some methods of gambling, such as placing a bet via telephone, can involve interstate commerce if the bet is transmitted across state lines.⁵ Congress has therefore enacted some federal gambling provisions. Those laws, however, provide somewhat of an awkward fit to Internet gambling.⁶ For example, the Wire Act—enacted to combat betting rings led by organized crime—forbids transmission of a bet or wager across state lines.⁷ In a Fifth Circuit case, the Wire Act was interpreted as only applicable to

1. *Online Gamblers Bet on Industry*, CHI. TRIB., Oct. 7, 2004, at 12 (quoting the CEO of BETonSPORTS.com, David Carruthers, as saying: “[T]here are millions of Americans wagering every day.”); Peter Gumbel, *How the U.S. Is Getting Beat in Online Gambling*, TIME, Nov. 28, 2005, at A1 (special section). It is estimated that there are 12 million online gamblers worldwide, and that 5.3 million of them are American. Susan Ormand, *Pending U.S. Legislation to Prohibit Offshore Internet Gambling May Proliferate Money Laundering*, 10 L. & BUS. REV. AM. 447, 448 (2004). “Internet gambling” will hereinafter refer to both gambling and sports betting on the Internet. “Operators” will refer to the people who operate gambling Web sites.

2. Matt Richtel, *Gambling Sites Offering Ways to Let Any User Be the Bookie*, N.Y. TIMES, July 6, 2004, at C1. Approximately seventy-five jurisdictions in the world allow operation of Internet gambling Web sites. Sue Schneider, *The Market—An Introduction*, in INTERNET GAMBLING REPORT 51 (Mark Balestra & Anthony Cabot eds., 7th ed. 2004).

3. UNITED STATES GENERAL ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 6, 45 (2002) [hereinafter GAO REPORT].

4. *Id.* at 12.

5. *Id.*

6. See ROBERT M. JARVIS ET AL., GAMING LAW CASES AND MATERIALS 563 (2003).

7. 18 U.S.C. § 1084 (2000).

sports betting.⁸ That decision leaves casino games, such as poker, blackjack, and slots, which are popular on the Internet, in a gray area.⁹ Various bills have been introduced in Congress to attempt to update federal gambling laws for the Internet, but none has passed both houses.¹⁰

The U.S. Department of Justice (DOJ), however, maintains that current federal gambling law does apply to Internet gambling and in fact makes it illegal.¹¹ In a letter dated June 11, 2003, the DOJ informed the National Association of Broadcasters (NAB) that “[w]ith very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore.”¹² Noting that advertisements for Internet gambling are “ubiquitous on the Internet, in print ads, and over the radio and television,” the DOJ asked the association to warn its members that should they accept money from Internet gambling operators, they would be aiding and abetting an illegal activity and would be punishable as a principal violator under 18 U.S.C. § 2.¹³ The DOJ noted that U.S. attorneys general have successfully prosecuted Internet gambling operations and “will continue to pursue such cases.”¹⁴

8. *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (2001).

9. See Pat King, *Legal Issues Still Unclear on 'Net Gaming*, LAS VEGAS BUS. PRESS, Oct. 22, 2001, at 3B.

10. Stevie Watson et al., *The Legalization of Internet Gambling: A Consumer Protection Perspective*, 23 J. PUB. POL'Y & MARKETING 209, 210 (2004). The Internet Gambling Prohibition Act (IGPA) of 1997 was an effort to make Internet gambling illegal under the Wire Act. *Id.* The bill was not passed, but it was reintroduced in 1999, when it passed the Senate but not the House of Representatives. *Id.* In 2001, the Unlawful Internet Gambling Funding Prohibition Act (UIGFPA) was introduced; this Act made it a crime for U.S. financial institutions to do business with the Internet gambling industry. *Id.* This bill was passed in 2002 and 2003 by the House, but did not get Senate support. *Id.* A companion bill to the UIGFPA, the Combating Illegal Gambling Reform and Modernization Act (CIGRMA), would amend the Wire Act to make online gambling illegal. Thomas James Friedrich, Comment, *Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition* 11 COMMLAW CONCEPTUS 369, 375 (2003). This bill passed the House Judiciary Committee in 2002, but was later “brought down by the conflicts of special interests.” *Id.* at 379–80.

11. Letter from John G. Malcolm, Deputy Assistant Attorney General, U.S. Dep't of Justice, to the National Ass'n of Broadcasters (June 11, 2003), available at <http://ww2.casinocitypress.com/ExhibitAtoComplaint.pdf> [hereinafter NAB Letter]. The DOJ stated that operators of betting and casino Web sites that accept U.S. customers violate 18 U.S.C. § 1084 (the Wire Act), 18 U.S.C. § 1952 (the Travel Act), and 18 U.S.C. § 1955 (the Organized Crime Control Act). NAB Letter, *supra*.

12. NAB Letter, *supra* note 11.

13. *Id.*

14. *Id.* As of 1999, the DOJ had brought charges against twenty-two Internet gambling operators for violation of the Wire Act. NATIONAL GAMBLING IMPACT STUDY COMMISSION, FINAL REPORT 5-9 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf> [hereinafter NGISC REPORT]. Former Attorney General Janet Reno has said, “The Internet is not

Subsequent to sending its advertising warning, the DOJ took steps to curb Internet gambling advertising.¹⁵ Prosecutors have convened grand juries to inquire about the broadcast of such advertising, and most major American broadcasters and online media, including Clear Channel Communications, Infinity Broadcasting, Discovery Networks, Yahoo!, and Google, have stopped carrying the advertisements.¹⁶ This tactic is quite telling about the nature of the Internet gambling industry.¹⁷ Safely situated offshore, operators may avoid U.S. law while raking in billions of U.S. dollars per year.¹⁸ The popularity of Internet gambling, especially sports betting and poker, continues to grow.¹⁹ The DOJ's response seems to be that if it can't prosecute operators directly, it may go after those they do business with in the United States.²⁰

an electronic sanctuary for illegal betting. To Internet betting operators everywhere, we have a simple message: "You can't hide online and you can't hide offshore." *Id.* at 5-10 (citing Benjamin Weiser, *14 Facing Charges in First U.S. Action on Internet Betting*, N.Y. TIMES, Mar. 5, 1998, at A1. At least one of the operators charged, Jay Cohen, was convicted and sentenced to twenty-one months in prison for his Internet gambling offense. Matt Richtel, *An Industry That Dares Not Meet in the Country of Its Best Customers*, N.Y. TIMES, May 17, 2004, at C4.

15. See Bruce Zagaris, *U.S. Authorities Seize Advertising Funds for Overseas Online Casinos*, 20 INT'L ENFORCEMENT L. REP. 353, 354 (Aug. 2004).

16. *Id.*; Matt Richtel, *Lawsuit Claims Free Speech for Online Casino Ads*, N.Y. TIMES, Aug. 23, 2004, at C3; see also Liz Benston, *Online Casinos Continue Marketing Push*, IN BUS. LAS VEGAS, Dec. 17, 2004, at 15. On September 24, 2004, the former owner of three St. Louis sports radio stations agreed to pay \$159,000 to settle a criminal investigation by the U.S. Attorney for the Eastern District of Missouri about the stations' advertising of sportsbooks. Peter Shinkle, *KFNS Settles with Government over Betting Ads*, ST. LOUIS POST-DISPATCH, Sept. 25, 2004, at 19. Similarly, the *Sporting News* agreed to pay \$7.2 million to settle federal claims regarding advertisements for Internet gambling. Peter Shinkle, *Sporting News Will Pay \$7.2 Million over Online Gambling Ads*, ST. LOUIS POST-DISPATCH, Jan. 21, 2006, at A6 [hereinafter Shinkle, *Sporting News*].

17. NGISC REPORT, *supra* note 14, at 5-10 (stating that the international nature of the online gambling business assists its "ability to circumvent regulations"); Watson et al., *supra* note 10, at 210 ("[T]he borderless, global nature of the Internet makes enforcement problematic, especially with providers in countries in which Internet gambling is legal.").

18. Estimates of Internet gambling revenue vary. In 2004, Christiansen Capital Advisors estimated that global Internet gambling revenue was \$7.4 billion. Anthony Cabot, *Traditional Versus Internet Gambling*, in INTERNET GAMBLING REPORT, *supra* note 2, at 33, 44.

19. In 2001, estimated global revenues in U.S. dollars for Internet gambling were \$3 billion; in 2002, \$4 billion; in 2003, \$5.7 billion. *Id.* In 2005 the estimated revenue was \$9.9 billion. *Id.* This growth resembles consumers' overall increased spending on "land-based" (non-Internet) gambling. Between 1982 and 1996, consumer spending on legal gambling grew at an average annual rate of 11.4 percent. Eugene Martin Christiansen, *Gambling and the American Economy*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 40 (1998). For the increased popularity of poker, see Schneider, *supra* note 2, at 53.

20. Shinkle, *Sporting News*, *supra* note 16 (quoting Roland Corvington, FBI agent in charge of the St. Louis District, as saying that enforcement of U.S. law against Internet gambling operators is aimed at companies that support them).

A. *The Casino City Complaint*

Thus, increasingly cut off from a major way to market to Americans, the Internet gambling industry attempted to strike back with a complaint seeking a declaratory judgment against the DOJ on First Amendment grounds.²¹ The complaint was filed on August 9, 2004, by Casino City, Inc., a United States company, in U.S. District Court in the Middle District of Louisiana.²² Casino City maintains a portal Web site at www.casinocity.com, which offers information and news about both online and traditional land-based gambling.²³ According to its complaint, Casino City “disseminates information . . . such as interviews with professional gamblers, advice and expert columns, directories, playing strategies and tips, weekly news publications and news clips.”²⁴ In its complaint, Casino City stated that the advertisements it accepts are neither misleading nor concern unlawful activity.²⁵ The complaint stated that Casino City does not knowingly accept payment from proceeds of illegal gambling or wagers placed by people located in the United States.²⁶ According to the complaint, the advertisements Casino City posts on its Web site are of the same content that the DOJ warned may constitute an aiding and abetting violation of various federal and state laws.²⁷ Casino City cited the “numerous subpoenas” issued by the DOJ to media outlets relating to Internet gambling advertisements as well as the NAB letter as creating reasonable and imminent

21. Complaint at 2, *Casino City, Inc. v. U.S. Dep’t of Justice*, No. 04-557-B-M3 (M.D. La. Aug. 7, 2004), available at <http://ww2.casinocitypress.com/ComplaintFiledon8-9-04.pdf> [hereinafter *Complaint*]. “Corfman [the CEO of Casino City] isn’t taking on Justice single-handed.” Spencer E. Ante, *High Stakes for Casino City*, *BUS. WK.*, Feb. 14, 2005, at 82, 82–83. Online gambling companies, including Sportingbet PLC, and trade associations are helping pay for the lawsuit. *Id.* at 82; see also Richtel, *supra* note 16 (quoting gambling attorney Lawrence G. Walters as saying that this is a test case).

22. *Complaint*, *supra* note 21, at 1.

23. See *Casino City*, <http://www.casinocity.com> (last visited Apr. 1, 2006).

24. *Complaint*, *supra* note 21, at 3.

25. *Id.* Under the test governing First Amendment protection for commercial speech, the activity advertised must be legal and not misleading. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); see *infra* note 58 and accompanying text.

26. *Complaint*, *supra* note 21, at 3.

Casino City does not conduct or participate in online casino or sports book activities. Casino City does not knowingly accept, in payment for running online casino or sports book advertisements, proceeds that come from illegal bets, deposits or wagers placed by persons located in the United States or anywhere world-wide, and the company has taken reasonable steps to ensure that such proceeds are not received.

Id.

27. *Id.* at 4.

fear of prosecution “within the advertising community resulting in a chilling effect upon the exercise of free speech.”²⁸

B. The DOJ Moves to Dismiss, and Casino City Responds

On October 29, 2004, the DOJ moved to dismiss Casino City’s complaint.²⁹ The DOJ’s reply brief addressed two major issues. The first issue was standing, which will not be discussed in this Comment.³⁰ The second issue addressed by the DOJ concerned the First Amendment. If Casino City is threatened with prosecution, the DOJ argued, it is because the conduct in question—Internet gambling—is illegal.³¹ The DOJ stated: “Casino City’s claim fails as a matter of law, for it is well-established that there is no First Amendment right to advertise illegal activity.”³² The DOJ then argued that it could satisfy the remaining prongs of the test for commercial free speech.³³

Casino City’s response to the DOJ’s Motion to Dismiss called the DOJ’s actions a “well orchestrated plan to unabashedly set out to stifle the free speech of an entire sector of the advertising industry.”³⁴ Casino City argued that it was forced to engage in conduct that is “likely proscribed by the challenged restriction *as interpreted by the DOJ*,” or censor itself.³⁵ Casino City stressed that its advertisements are available in every country, not just the United

28. *Id.* at 2–3. “On information and belief, as a direct result of the DOJ threats, a number of internet advertising portals based in the United States have ceased to accept advertising of legal casino and sports betting.” *Id.*

29. Memorandum of Law in Support of Defendant’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 1, *Casino City, Inc. v. U.S. Dep’t of Justice*, No. 04-557-B-M3 (M.D. La. Oct. 29, 2004), *available at* <http://pdf.online.casinocity.com/MotionToDismiss.pdf> [hereinafter DOJ Motion to Dismiss].

30. *Id.* at 7. The DOJ argued that Casino City had no standing to bring this complaint. *Id.* at 7–9. The DOJ alleged a contradiction in the complaint—that Casino City stated both that its advertisements are of the same type that violate U.S. law (as interpreted by the DOJ), and also that the advertisements concerned legal activity. *Id.* at 16. If Casino City is engaged in legal activity, the DOJ argued, it is in no danger of imminent prosecution. *Id.* On the other hand, if Casino City is engaged in illegal activity, there would be no basis for it to assert First Amendment protection, because only advertisements that contain speech about legal conduct are protected. *Id.* at 17. Further, the DOJ argued that there is no imminent threat of prosecution because more than one year has passed since the NAB Letter was sent, and Casino City received no correspondence from the DOJ. *Id.* at 14.

31. *Id.* at 17–18.

32. *Id.* at 17 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980)).

33. *Id.* at 19.

34. *Casino City, Inc.’s Memorandum of Law in Response to Defendant’s Motion to Dismiss at 1, Casino City, Inc. v. U.S. Dep’t of Justice*, No. 04-557-B-M3 (M.D. La. Nov. 18, 2004), *available at* <http://pdf.online.casinocity.com/MemoinResponsetoMotiontoDismiss.pdf> [hereinafter *Casino City Response*].

35. *Id.* at 9 (emphasis added).

States, and that many of its readers live in countries where Internet gambling is legal.³⁶ Casino City's response also reiterated that it could satisfy the test for commercial speech protection.³⁷ After Casino City filed its response, the DOJ filed a Reply Brief in Support of Defendant's Motion to Dismiss.³⁸

C. Motion to Dismiss Granted, Appeals Follow

The complaint was a risk for Casino City, but perhaps the Internet gambling industry felt it was worth a try, given that much advertising has already been blocked.³⁹ If the court had given Casino City the declaratory judgment it sought, it would have been perceived as a win for the industry that could result in legitimization or perhaps even a step toward regulation in the United States. Casino City lost its gamble on February 15, 2005, when the district court granted the DOJ's motion to dismiss for lack of standing.⁴⁰ In its ruling, the court also stated that Casino City did not have a valid First Amendment claim, because if it were prosecuted, it would be for illegal activities.⁴¹ This Comment will analyze Casino City's First Amendment issue assuming the company had been found to have standing. It is conceivable that this issue could come before a court again. Further, due to precedent in the Fifth Circuit, it is conceivable that a court in the future could find a right to advertise Internet casinos but not Internet sports books. Commercial speech doctrine under the First Amendment has been called a compromise between the rights of consumers to get information about products and the rights of the government to regulate the sale of products.⁴² In the case of gambling

36. *Id.* at 21–22 (“Casino City places advertisements . . . [that] are available for viewing by tens of millions of people making up the worldwide audience of the Internet, many of whom are located in countries where engaging in the conduct that is advertised is expressly legal.”).

37. *Id.* at 23–26. For the test that the Supreme Court uses to determine whether commercial speech receives First Amendment protection, see *infra* note 58 and accompanying text.

38. Reply Brief in Support of Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 1, *Casino City, Inc. v. U.S. Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Dec. 3, 2004), available at <http://pdf.online.casinocity.com/CasinoCityDOJreplybrief.pdf> [hereinafter DOJ Reply]. On January 27, 2005, Casino City and the DOJ participated in a telephone status conference. Minute Entry Order at 1, *Casino City, Inc. v. U.S. Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Jan. 27, 2005), available at <http://pdf.online.casinocity.com/TelephoneStatusConference27January2004.pdf>.

39. Interview with Sue Schneider, Internet gambling industry consultant and former chairman of the Interactive Gaming Council, in St. Charles, Mo. (Oct. 28, 2004).

40. Ruling at 7, *Casino City, Inc. v. U.S. Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 15, 2005), available at <http://pdf.online.casinocity.com/DismissalRulingandOrder.pdf>. Casino City has appealed. See Notice of Appeal at 1, *Casino City, Inc. v. U.S. Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Apr. 12, 2005), available at <http://pdf.online.casinocity.com/NoticeOfAppeal.pdf>.

41. Ruling, *supra* note 40, at 13.

42. *E.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (“The entire commercial speech doctrine, after all, represents an accommodation between the right to speak

advertisements, however, there is little information to be exchanged other than alerting consumers that gambling is available.⁴³ Internet gambling is not going to go away, and perhaps the U.S. government could serve consumers better by strictly regulating it—and heavily taxing it—than trying to block advertisements for it.⁴⁴ But the merits of regulating Internet gambling are a separate issue. This Comment’s focus is on whether U.S. media companies have a constitutional right to advertise Internet gambling in the United States without incurring potential criminal liability.

This Comment will first discuss the relevant First Amendment case law regarding commercial speech and the Internet. It will then explore the First Amendment issue in the Casino City complaint via discussion of each element of the test used by the Supreme Court to determine whether a commercial speech restriction violates the First Amendment.⁴⁵ As part of the discussion of each element of the commercial speech test, the Author will analyze how the court may have ruled on the free speech issue had it not dismissed the complaint for lack of standing.

II. FIRST AMENDMENT CASE LAW

A. *Commercial Speech and Gambling*

The First Amendment of the U.S. Constitution states that Congress shall make no law “abridging the freedom of speech, or of the press.”⁴⁶ Many people view free speech as the most important right that Americans have.⁴⁷

and hear expression *about* goods and services and the right of government to regulate the sale of such goods and services.”).

43. Bruce Ledewitz, *Corporate Advertising’s Democracy*, 12 B.U. PUB. INT. L.J. 389, 421 (2003). Ledewitz states:

Anyone who has ever seen or heard gambling advertising knows that by and large it contains no information. Rather, the point of the advertising is to remind people that gambling is available, and the point of limiting advertising is to keep susceptible people from being reminded of the temptation to gamble. Does a ban on gambling advertising then manipulate the flow of information, as supporters of commercial speech fear, or “manipulate” the flow of manipulation?

Id.

44. For support of legalization and regulation of Internet gambling in the United States, see Adrian Parke & Mark Griffiths, *Why Internet Gambling Prohibition Will Ultimately Fail*, 8 GAMING L. REV. 295, 298 (2004); R. Scott Girdwood, *Place Your Bets . . . on the Keyboard: Are Internet Casinos Legal?*, 25 CAMPBELL L. REV. 135, 148 (2002); Friedrich, *supra* note 10, at 370.

45. For an explanation of elements of the test used by Supreme Court in commercial free speech cases, see *infra* note 58 and accompanying text.

46. U.S. CONST. amend. I.

47. ROY L. MOORE ET AL., *ADVERTISING AND PUBLIC RELATIONS LAW* 14–15 (1998) (“[M]any believe almost all other interests are subservient to [free speech] . . .”). Another writer considers free speech essential for “individual liberty.” “The First Amendment protects a person’s

The executive and judicial branches are also forbidden from infringing on constitutionally protected speech.⁴⁸ The Supreme Court's commercial speech jurisprudence is an anomaly in First Amendment law, which for the most part does not allow speech to be distinguished solely based on content.⁴⁹

Commercial speech was given First Amendment protection for the first time in 1975 with *Bigelow v. Virginia*⁵⁰ and the next year in *Virginia Board of Pharmacy v. Virginia Citizens Council*.⁵¹ The test for whether commercial free speech is protected was first put forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵² a landmark case that came on the heels of the *Pharmacy* and *Bigelow* decisions.⁵³ The standard of judicial review for commercial speech set forth in *Central Hudson* is the current standard.⁵⁴

In *Central Hudson*, the New York Public Service Commission had banned promotional advertising of the appellant utility company that had a monopoly in its service area.⁵⁵ The commission wanted to discourage energy consumption.⁵⁶ Justice Powell, writing for the majority, articulated the test for whether commercial speech is protected:

[I]t must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.⁵⁷

use of speech to order and create the world in a desired way and as a tool for understanding and communicating about that world in ways he or she finds important. These uses are fundamental aspects of individual liberty and choice." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989).

48. EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 3 (1985).

49. *Id.* at 4. One reason commercial speech is granted less protection than other kinds of speech is that commercial speech is profit oriented. BAKER, *supra* note 47, at 196. According to Baker, commercial speech "lacks the crucial connections with individual liberty and self-realization that are central to justifications for the constitutional protection of speech, justifications that in turn define the proper scope of protection under the first amendment." *Id.*

50. 421 U.S. 809 (1975).

51. 425 U.S. 748 (1976); Ledewitz, *supra* note 43, at 392-93. In *Pharmacy*, the Court gave three justifications for protecting advertising: First, commercial speech is similar to other types of protected speech; second, access to advertising promotes an efficient market through cost savings that benefit consumers; and third, judgments about how to regulate the market may depend on the free flow of information. *Id.* at 393.

52. 447 U.S. 557 (1980).

53. Ledewitz, *supra* note 43, at 394.

54. ROME & ROBERTS, *supra* note 48, at 116-17.

55. *Cent. Hudson*, 447 U.S. at 558.

56. *Id.* at 560.

57. *Id.* at 566.

Applying the test, Powell wrote that the commission did not state whether the activity in question, regarding public utilities, is lawful or misleading.⁵⁸ The state did have a clear and substantial interest in keeping utility rates fair and efficient.⁵⁹ The state's interest in energy conservation was directly advanced by the advertising ban because there was a direct connection between advertising and demand for electricity.⁶⁰ However, the commission failed the last prong because it did not demonstrate that its interest in energy conservation could not be adequately protected by a less-restrictive method.⁶¹ The commission could, for instance, require the utility to promote the relative efficiency of some of its products.⁶² The Court's rationale for protecting some, but not all, commercial speech is that commercial speech proposes a commercial transaction, an area traditionally regulated by the government.⁶³ Further, advertisers are in a good position to judge the accuracy of their speech and its lawfulness.⁶⁴

Justice Rehnquist dissented in *Central Hudson*.⁶⁵ He wrote that because the utility was a monopoly, it deserved more supervision than an ordinary corporation.⁶⁶ He also stated that the fourth prong of the test was misguided because it "leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did."⁶⁷ A question remaining after *Central Hudson* is one that remains today: whether commercial speech is any less protected than other kinds of speech.⁶⁸

Two years after *Central Hudson*, the Court explicitly stated that when commercial speech proposes an illegal transaction, the government may regulate or entirely ban the speech.⁶⁹ In that case, *Village of Hoffman Estates*

58. *Id.*

59. *Id.* at 569.

60. *Cent. Hudson*, 447 U.S. at 569.

61. *Id.* at 570.

62. *Id.*

63. *Id.* at 562. The Court's rationale for protecting commercial speech that passes the test can be broken into five parts. ROME & ROBERTS, *supra* note 48, at 82–83. Briefly put, the Court first stated that commercial speech should be protected because it is in society's interest to have the fullest possible sharing of information. *Id.* at 82. Second, the Court rejected the "highly paternalistic view" that the government can suppress all commercial speech. *Id.* at 83. Third, people will perceive their own best interest if they are fully informed, and open channels of communication promote that. *Id.* Fourth, even though advertising gives only one side of the facts, this is better than nothing. *Id.* And fifth, the protection for commercial speech is based on the informational function of advertising. *Id.*

64. ROME & ROBERTS, *supra* note 48, at 82 (quoting *Cent. Hudson*, 447 U.S. at 564 n.6).

65. *Cent. Hudson*, 447 U.S. at 583.

66. *Id.* at 587; see Ledewitz, *supra* note 43, at 395.

67. *Cent. Hudson*, 447 U.S. at 599–600.

68. Ledewitz, *supra* note 43, at 395–96.

69. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 496 (1982).

v. Flipside, the Court upheld an ordinance regulating the sale of drug-related goods and literature.⁷⁰ The Court stated that the only speech interest implicated was the display of the merchandise.⁷¹ In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁷² the Court held that it was not a violation of free speech to prohibit a newspaper from running employment advertisements in separate columns for men and women, because that type of sex discrimination is an illegal activity.⁷³

Six years after *Central Hudson* was decided, Chief Justice Rehnquist wrote the majority opinion in a decision that directly addressed gambling advertisements. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁷⁴ the appellant operated a legal casino in Puerto Rico.⁷⁵ It was illegal to advertise or otherwise offer gambling facilities to the public of Puerto Rico.⁷⁶ The appellant had been fined twice for breaking the advertising restriction and sought a declaratory judgment that the statute prohibiting casino advertising violated the First Amendment, the Due Process Clause, and the Equal Protection Clause.⁷⁷ The Court said that because the speech did no more than propose a commercial transaction, the *Central Hudson* test should be applied.⁷⁸ Rehnquist found that the activity was not illegal, misleading, or fraudulent in the abstract.⁷⁹ The state did have a substantial interest in reducing the demand for gambling among the territory's residents,⁸⁰ the government interest was directly advanced by the speech restriction, and the statute against advertising was no more restrictive than necessary.⁸¹ Significantly, Rehnquist stated that because the Puerto Rico Legislature could have completely banned casino gambling, it therefore had the power to ban advertisement of casino gambling.⁸² Rehnquist wrote:

70. *Id.* at 495–97.

71. *Id.* at 496.

72. 413 U.S. 376 (1973).

73. *Id.* at 391.

74. 478 U.S. 328 (1986).

75. *Id.* at 333.

76. *Id.* at 332. It was permitted to advertise to tourists. *Id.* at 332–33.

77. *Id.* at 333–34.

78. *Id.* at 340.

79. *Posadas*, 478 U.S. at 340–41.

80. *Id.* at 341. The Tourism Company, which was charged with administering the statute on gambling advertisement prohibition, stated:

Excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.

Id.

81. *Id.* at 342–43.

82. *Id.* at 345–46; see Ledewitz, *supra* note 43, at 396.

[I]t would be a . . . strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.⁸³

The *Posadas* decision has been criticized; one gambling law expert, I. Nelson Rose, said that it “warped the First Amendment.”⁸⁴

The Court observed, in *Board of Trustees of the State University of New York v. Fox*,⁸⁵ that none of its past invalidation of government regulation of commercial speech involved rules that only “marginally” failed the fourth prong of the *Central Hudson* test.⁸⁶ “[A]lmost all of the restrictions disallowed under *Central Hudson*’s fourth prong have been substantially excessive, disregarding ‘far less restrictive and more precise means,’” Justice Scalia stated for the Court.⁸⁷ On the other hand, when the Court upholds speech restrictions under the test, it does not first have to be satisfied that the government is employing the least restrictive means.⁸⁸ The restriction in question in *Fox* was a university rule against selling commercial goods at university facilities.⁸⁹ The Court ultimately decided that the claim was not ripe for resolution.⁹⁰ The Court stated that to pass muster under the fourth prong of the *Central Hudson* test, there must be a reasonable “fit” between the legislature’s ends and the means by which those ends are to be accomplished.⁹¹ The means, in other words, must be “narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may be best employed.”⁹² The Court thus declared that the fit does not need to be perfect or the single best way to prevent the stated harm, but it should not be totally disproportionate to the harm, either.

Ten years after *Posadas*, the Court decided *44 Liquormart, Inc. v. Rhode Island*.⁹³ The decision “formally repudiated” *Posadas*.⁹⁴ A liquor retailer had

83. *Posadas*, 478 U.S. at 346.

84. I. Nelson Rose, *Gambling and the Law: Understanding the Law of Internet Gambling*, in 89 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS 177, 179 (2001). Rose writes that the Court’s holding “is like saying that if a state may punish murder with the death penalty it can also punish murder with anything short of the death penalty, such as torture.” *Id.*

85. 492 U.S. 469 (1989).

86. *Id.* at 479.

87. *Id.* (quoting *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 476 (1988)).

88. *Id.*

89. *Id.* at 471–72.

90. *Fox*, 492 U.S. at 485–86.

91. *Id.* at 480 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)).

92. *Id.*

93. 517 U.S. 484 (1996).

brought a declaratory action challenging, on First Amendment grounds, a Rhode Island law prohibiting the advertisement of liquor prices.⁹⁵ Justice Stevens, writing for the majority, stated that the First Amendment calls for skepticism of any regulation that seeks “to keep people in the dark for what the government perceives to be their own good.”⁹⁶ He concluded that the Court in *Posadas* got the First Amendment analysis wrong.⁹⁷ The Court in *Posadas* should not have ruled that because the legislature may ban the conduct, it may ban speech about the conduct.⁹⁸ The Constitution, Stevens wrote, “presumes that attempts to regulate speech are actually more dangerous than attempts to regulate conduct.”⁹⁹ He continued, “[S]peech restrictions cannot be treated as simply another means that the government may use to achieve its ends.”¹⁰⁰

In *Greater New Orleans Broadcasting Ass’n v. United States*,¹⁰¹ the Court again faced the issue of gambling advertisements. The case concerned the Communications Act of 1934,¹⁰² which prohibits radio and television broadcast of advertisements for privately operated casinos or lotteries.¹⁰³ Louisiana broadcasters sought a declaratory judgment that the ban amounted to a free speech violation and also sought an injunction preventing enforcement of the statute.¹⁰⁴ Applying *Central Hudson*, the Court found that the conduct was legal and not misleading.¹⁰⁵ Justice Stevens wrote that while the government interest in lessening social ills associated with gambling is substantial, the federal policy of discouraging gambling is “decidedly equivocal,” because Congress has also passed pro-gaming laws, such as those relating to tribal gambling.¹⁰⁶ Further, the social costs of gambling are offset and sometimes outweighed by economic benefits.¹⁰⁷ As for the third prong of the test, the restriction was found not to materially advance the government’s goals.¹⁰⁸ The advertisements could be seen merely to channel a gambler from one casino to another, not to encourage more gambling.¹⁰⁹ Additionally, Congress was simultaneously encouraging tribal casino gambling, which could

94. Ledewitz, *supra* note 43, at 397.

95. *44 Liquormart*, 517 U.S. at 492–93.

96. *Id.* at 503.

97. *Id.* at 509.

98. *Id.* at 510.

99. *Id.* at 512.

100. *44 Liquormart*, 517 U.S. at 512.

101. 527 U.S. 173 (1999).

102. 18 U.S.C. § 1304 (2000).

103. *Greater New Orleans*, 527 U.S. at 177.

104. *Id.* at 181.

105. *Id.* at 184–85.

106. *Id.* at 186–87.

107. *Id.* at 186.

108. *Greater New Orleans*, 527 U.S. at 188.

109. *Id.* at 189.

also increase problem gaming.¹¹⁰ The Court held the government failed to specifically connect private casino gambling with gambling addiction via broadcast advertisements.¹¹¹ Last, the Court found that it did not matter whether the restriction is more than what is necessary to advance the government's interest, because section 1304 of the Communications Act is "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."¹¹² The Act contained exemptions for almost every sub-group of gambling.¹¹³

In recent years, some members of the Court have expressed doubt about the *Central Hudson* test and when it should be applied.¹¹⁴ One commentator stated that the level of First Amendment protection for advertising seems to be rising and that some day it could be entitled to the highest sort of constitutional protection.¹¹⁵ In some of the commercial speech cases from the last decade, members of the Court have dissented to state their dissatisfaction with the *Central Hudson* test. In *Lorillard Tobacco Co. v. Reilly*,¹¹⁶ Justice Kennedy stated concern in his concurrence that the test gives "insufficient protection to truthful, non-misleading commercial speech" and that all government restraint of truthful speech should be analyzed under the strict scrutiny test.¹¹⁷ In *44 Liquormart*, Justice Scalia expressed "discomfort" about the test, but wrote that the Court does not have the "wherewithal" to replace it.¹¹⁸ Justice Thomas concurred in that case, declaring that when the government's asserted interest is to withhold information from legal users of a product or service, the *Central Hudson* test should not be applied.¹¹⁹ While *Central Hudson* is the test that is

110. *Id.*

111. *Id.*

112. *Id.* at 190. Additionally, in *Thompson v. Western States Medical Center*, the Court struck down a prohibition on advertising of compounded drugs. 535 U.S. 357, 377 (2002). The Court ruled that speech prohibitions must be the government's last resort: "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Id.* at 373.

113. *Greater New Orleans*, 527 U.S. at 190. Gambling sub-groups could include lotteries, horse racing, greyhound racing, legal bookmaking, and gambling on Indian reservations. See Christiansen, *supra* note 19, at 39 tbl.1.

114. *Thompson*, 535 U.S. at 367.

115. Ledewitz, *supra* note 43, at 395, 398.

116. 533 U.S. 525 (2001).

117. *Id.* at 571–72 (Kennedy, J., concurring in part and concurring in the judgment).

118. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part and concurring in the judgment).

119. *Id.* at 518 (Thomas, J., concurring in Parts I, II, VI, and VII, and concurring in the judgment). Thomas wrote: "[T]he *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not." *Id.* at 528. Thomas also stated that the test is difficult to uniformly apply and that it leads to a case-by-case balancing test susceptible to individual judicial preference. *Id.* at 527.

still used by the Court, based on these concurring and dissenting opinions, *Central Hudson* may someday no longer be the test used to weigh First Amendment protection for commercial speech. No member of the Court, however, has spoken up in favor of protected commercial speech that advertises illegal behavior.

B. Free Speech and the Internet

In 1997, the Supreme Court ruled that the Communications Decency Act (CDA), which aimed to prevent children from seeing pornography on the Internet, violated the First Amendment.¹²⁰ While this was not a commercial speech case, some parts of the opinion are useful to the complaint at hand. The Court noted at the outset that the Internet is a “unique and wholly new medium of worldwide human communication.”¹²¹ Justice Stevens, author of the majority opinion, wrote: “The Web is thus comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”¹²² Stevens also expressed the rarity with which one encounters Internet content randomly.¹²³ “Unlike communications received by radio or television, ‘the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.’”¹²⁴ The Court also stated that it has often recognized that the government has an interest in protecting children from harmful materials.¹²⁵ However that interest does not justify an overbroad restriction of speech that “reduce[s] the adult population . . . to . . . only what is fit for children.”¹²⁶

After the judgment in *Reno*, Congress passed the Child Online Protection Act (COPA), which was meant to achieve the same purpose as the CDA.¹²⁷ The Court ultimately struck COPA down as well, stating that less-restrictive means are available to protect children from pornography.¹²⁸ Justice Kennedy,

For another example of disapproval of the *Central Hudson* test, see the concurrence of Justice Stevens in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (referring to the test as “misguided”).

120. *Reno v. ALCU*, 521 U.S. 844, 849 (1997). The Court struck down the CDA in *Reno v. ACLU* because “it was not narrowly tailored to serve a compelling government interest and less restrictive means were available.” *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004).

121. *Reno*, 521 U.S. at 850 (citation omitted).

122. *Id.* at 853.

123. *Id.* at 854.

124. *Id.* (citation omitted).

125. *Id.* at 875.

126. *Reno*, 521 U.S. at 875 (quoting *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 717, 759 (1996)).

127. *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004).

128. *Id.* at 665. A less-restrictive method of protecting children from Web porn would be installment of filtering software on the family computer. *Id.* at 667.

writing for the majority, and Justice Stevens, in a concurring opinion, made a few points relevant to the Internet gambling advertising issue. First, Kennedy noted the district court's finding that forty percent of "harmful-to-minors content" comes from overseas, beyond the reach of COPA.¹²⁹ American providers of this content could simply move overseas to avoid COPA.¹³⁰ Justice Stevens, in a concurring opinion, wrote that "[g]overnment may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption."¹³¹ Stevens also noted that he is uneasy with using criminal statutes as a substitute for parental control over children's Web use.¹³²

III. APPLICATION OF THE *CENTRAL HUDSON* TEST TO CASINO CITY'S COMPLAINT

The First Amendment applies to speech on the Internet, and laws governing traditional advertising also apply to Internet advertising.¹³³ Internet gambling itself is not a free speech concern; governments around the world treat it as a problem within gambling law rather than within communications law.¹³⁴ In the United States, regulation of gambling is reserved to the states through the Tenth Amendment, and there is no constitutional right to gamble.¹³⁵ This unlimited power to prohibit gambling is a contrast to the

129. *Id.*

130. *Ashcroft*, 542 U.S. at 667.

131. *Id.* at 674 (Stevens, J., concurring).

132. *Id.* at 675.

133. Linda A. Goldstein, *Update on Internet Advertising and Promotions*, 691 PRACTISING L. INST. 1169, 1176 (2002). Because the United States values free speech, it does not go as far as some other countries in controlling Internet content through Internet Service Providers (ISPs). Anthony Cabot, *Prohibitory Challenges*, in INTERNET GAMBLING REPORT, *supra* note 2, at 190.

134. Rose, *supra* note 84, at 178-79. U.S. federal courts have ruled that gambling is a commercial act and is therefore not subject to First Amendment protection as pure speech. NGISC REPORT, *supra* note 14, at 5-12.

135. Rose, *supra* note 84, at 180 (citing *State v. Rosenthal*, 559 P.2d 830, 836 (1977)). Gambling has traditionally been seen as a moral issue over which states can use their police power. *Id.* at 183. In the United States, gambling regulations are supported by federal law that prevents undermining of state law by interstate and foreign commerce. GAO REPORT, *supra* note 3, at 12. State governments undertake most enforcement of gambling laws, but enforcing these laws on the Internet will "become an insurmountable problem for state governments because they lack funding, technical capabilities, and the legal authority." Anthony Cabot, *Study Materials for Internet Gaming: Domestic and International Developments*, 81 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS 179, 184 (2000). States recognize this, and the National Association of Attorneys General (NAAG) has asked Congress to pass a law specific to Internet gambling. *Id.*; see also NGISC REPORT, *supra* note 14, at 5-9 (quoting NAAG committee member James E. Doyle as saying that Congress should make Internet gambling illegal: "[S]imply because an activity is

freedom of speech, and under *44 Liquormart*, does not entitle government to ban advertising about gambling simply because it can ban gambling.¹³⁶ If Casino City had been found to have standing, its complaint would probably have been analyzed under the *Central Hudson* test.¹³⁷ The next few sections discuss how Casino City's complaint would fare under each of the four prongs of the test. The threshold question is whether Casino City's complaint concerns a legal activity.

A. *Prong One: Legal Activity That is Not Misleading*

The first step of the *Central Hudson* test requires a determination that the advertised conduct is legal and not misleading.¹³⁸ The DOJ interprets federal law to prohibit Internet gambling.¹³⁹ But federal law could be more specific on the subject.¹⁴⁰ Whether Internet gambling—sports betting or casino games, or both—is legal is a crucial question. If the DOJ is correct that all Internet gambling is illegal, Casino City would have no basis to insist that it has a First Amendment right to post the advertising.¹⁴¹

1. Arguments

Casino City's complaint alleged that application of federal gambling law against it and others similarly situated would violate the First Amendment.¹⁴² The DOJ, in its motion to dismiss, brought up *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*. In that case, the Supreme Court held that a newspaper had no constitutional right to run gender-specific help-wanted advertisements because sex discrimination in employment is illegal.¹⁴³

difficult to control does not mean law enforcement should be forced to stick its head into the sand and act as though the issue does not exist.”).

136. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

137. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). See Lawrence G. Walters, *Advertising and U.S. Law*, in INTERNET GAMBLING REPORT, *supra* note 2, at 331, for additional discussion of advertising of Internet gambling.

138. *Cent. Hudson*, 447 U.S. at 566.

139. The DOJ takes the position that any activity that is illegal offline is illegal online. Rose, *supra* note 84, at 194; see NAB Letter, *supra* note 11.

140. Professor I. Nelson Rose of Whittier Law School has said that it is not clear whether federal law aimed at sports betting also applies to other forms of gambling. Pat King, *Legal Issues Still Unclear on 'Net Gaming*, LAS VEGAS BUS. PRESS, Oct. 22, 2001, at 3B; see JARVIS ET AL., *supra* note 6, at 563.

141. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1976).

142. Complaint, *supra* note 21, at 4. Casino City urged that the NAB Letter, as well as the knowledge that media companies have been subpoenaed regarding Internet gambling advertising, creates a fear of prosecution and a chilling effect upon the exercise of free speech. *Id.* at 3.

143. DOJ Motion to Dismiss, *supra* note 29, at 18; *Pittsburgh Press*, 413 U.S. at 388–89. The DOJ also noted that in *Village of Hoffman Estates v. Flipside*, in which the Supreme Court held that to the extent commercial speech proposes an illegal transaction, the government may regulate

The DOJ stated that if Casino City accepts advertisements for Internet gambling sites which take bets from U.S. customers, it is advertising illegal conduct, and there is no First Amendment right to do that.¹⁴⁴ Casino City's reply did not argue that Internet gambling is a legal, non-misleading activity, exactly.¹⁴⁵ It attempted to make the case that the online gambling advertisements which it wanted to run should be legal because they target a worldwide audience that includes jurisdictions where Internet gambling is legal—that when the medium is the Internet, a country such as the United States has no right to ban advertisements for conduct that is illegal within its borders, because such advertisements can also be seen by people in other countries.¹⁴⁶ Casino City stated that the implications for “the Internet and technology” are the same in this case as they were in *Reno v. ACLU* and *Ashcroft v. ACLU* because the “broad global impact . . . is of special relevance.”¹⁴⁷ Also of relevance was the less-invasive nature of the Internet compared with radio and television; the Internet requires affirmative steps to access.¹⁴⁸ The Internet, argued Casino City, creates new First Amendment challenges, and “the DOJ cannot assert that the advertisements placed by Casino City concern per se illegal conduct,” because of the medium's worldwide audience.¹⁴⁹ Further, Casino City argued that its claim is more compelling than that of the gambling advertisers in *Greater New Orleans*, because the speech is directed via Internet toward the entire world.¹⁵⁰ Last, Casino City brought up a recent Second Circuit decision about Internet

the speech or ban it entirely. DOJ Motion to Dismiss, *supra* note 29, at 18–19; *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 496 (1982).

144. DOJ Motion to Dismiss, *supra* note 29, at 19 n.7 (stating that “if Casino City is running advertisements for [Internet gambling operations that accept bets from U.S. customers], Casino City is advertising illegal activity, and such advertisements are unprotected by the First Amendment regardless of Casino City's liability under 18 U.S.C. §2 [the aiding and abetting statute]”).

145. *See generally* Casino City Response, *supra* note 34.

146. Casino City Response, *supra* note 34, at 18–23. Casino City stated that it offers “advertisements for online sports books and casinos on its portals, once there the advertisements are available for viewing by tens of millions of people making up the worldwide audience of the Internet, many of whom are located in countries where engaging in the conduct that is advertised is expressly legal.” *Id.* at 21–22. One country where Internet gambling is legal is Antigua, which in November 2004 won a World Trade Organization Panel ruling that U.S. policies against Internet gambling disagree with the terms of the General Agreement on Trade Services. *See id.* at 19 n.8; Matt Richtel, *U.S. To Appeal W.T.O Ruling that Favored Internet Gambling*, N.Y. TIMES, Jan. 8, 2005, at C4.

147. Casino City Response, *supra* note 34, at 19.

148. *Id.* at 20.

149. *Id.* at 21. In a footnote, Casino City referenced cases stating that the adult population should not necessarily be restricted to reading only what is “fit for children.” *Id.* at 21 n.11 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001)).

150. *Id.* at 22.

advertising, *Swedenburg v. Kelly*,¹⁵¹ in which the court struck down a New York law that prohibited unlicensed wine dealers from advertising or soliciting sales for alcoholic beverages, regardless of whether the purchase was to be made in the state or not.¹⁵² In *Swedenburg*, the Court ruled it was a violation of the First Amendment for New York to declare that wineries couldn't advertise on the Internet and include order forms that are legal in their own states.¹⁵³

The DOJ replied that Casino City's arguments had no merit, stating: "Because it is illegal for plaintiff's customers to operate anywhere in this country, plaintiff's Internet theory is grounded before it can even take flight."¹⁵⁴ Casino City, it pointed out, had no legal support for the notion that because an activity is legal somewhere in the world, advertisement of that activity should be allowed in the United States under *Central Hudson*.¹⁵⁵ "[That] these criminal businesses may be operating legally in other countries . . . in no way mitigates the seriousness of such violations . . ." ¹⁵⁶ Further, the overbreadth doctrine as applied to sexually explicit speech does not apply to commercial speech; thus, a ban on advertisement of online gambling in jurisdictions where it is legal cannot chill the same advertisements in jurisdictions where it is legal.¹⁵⁷ Finally, the DOJ argued that Casino City relied, in error, on cases that concern speech which cannot be banned in any jurisdiction—such as the indecent material that is the subject of *Reno v. ACLU* and *Ashcroft v. ACLU*.¹⁵⁸

2. Analysis

The DOJ and Casino City made different types of arguments under the first prong of the *Central Hudson* test. The DOJ made a traditional argument based on statutes and precedent. Casino City seemed to be arguing that the illegality threshold of the *Central Hudson* test should be reconsidered for Internet

151. 358 F.3d 223, 240 (2d Cir. 2004).

152. Casino City Response, *supra* note 34, at 22–23; *Swedenburg*, 358 F.3d at 240.

153. *Swedenburg*, 358 F.3d at 241.

154. DOJ Reply, *supra* note 38, at 9.

155. *Id.* at 9.

Casino City appears to suggest that activity advertised via the Internet should not be deemed illegal under the first prong of *Central Hudson* if it is legal anywhere in the world. It identifies no support in any judicial decision, however, for a rule that would allow the world's most permissive legal regime to influence in any way the ability of this country to enforce its laws.

Id.

156. *Id.*

157. *Id.* at 10 (citing *Waters v. Churchill*, 511 U.S. 661, 670 (1994)).

158. DOJ Reply, *supra* note 38, at 11. The DOJ also noted that in *Reno v. ACLU*, the Supreme Court "strongly suggested" that it would be possible to entirely ban transmission of obscenity. *Id.*

advertising, because the content will be seen in a variety of jurisdictions with varying laws about Internet gambling.¹⁵⁹

The DOJ stated, both in its pleadings and in its letter to the NAB, that Internet gambling is illegal in the United States.¹⁶⁰ However, as the following statutes and cases show, it is possible to make the case that, at least as far as Fifth Circuit precedent is concerned, the legality of Internet *casino* games—as opposed to sports betting—is open to differing interpretations.¹⁶¹

The Wire Act is the most commonly used law in Internet gambling prosecutions.¹⁶² The Wire Act makes it illegal for a person or company engaged in the business of betting to use a “wire communication facility” to transmit bets or information assisting in the placing of bets across state lines.¹⁶³ Accepting or arranging bets for a fee usually amounts to being in the business of betting, and the Wire Act does not apply to the casual bettor who is not in the business.¹⁶⁴ The Act was passed in 1961, obviously before the existence of the Internet, and the technology to which it refers—a “wire communication facility”—means “a system that is used to transmit writings, pictures and sounds ‘by and of a wire, cable or other like connection between points of origin and reception of such transmission.’”¹⁶⁵ Current interpretation of the Wire Act is that, despite its reference to wires, it applies to Internet communication.¹⁶⁶ Many people access the Internet through telephone lines, and even if a consumer is placing a bet using a wireless Internet connection,

159. “Because the Net is global, the ads on Casino City may be viewed by anyone, including people in countries where online gambling is legal.” Ante, *supra* note 21, at 82.

160. See NAB Letter, *supra* note 11. Additionally, the DOJ wrote an opinion letter to the Nevada Gaming Control Board stating that Internet gambling is illegal according to current federal law. The letter also stated that the DOJ considers the actual gambling activity to occur both in the jurisdiction of the gambler and that of the gambling company. Gregory Manter, *The Pending Determination of the Legality of Internet Gambling in the United States*, 2003 DUKE L. & TECH. REV. 16, 10.

161. Casino City and its lawyers told *BusinessWeek* that only sports betting is illegal online, and that casino games and bingo are still permitted. Ante, *supra* note 21, at 82.

162. NGISC REPORT, *supra* note 14, at 5-6. See Joseph Kelly et al., *U.S. Policy, in INTERNET GAMBLING REPORT*, *supra* note 2, at 257, for additional information and background on the Wire Act and other federal gambling laws.

163. 18 U.S.C. § 1084 (2000). The elements of the Wire Act that the government must establish to prove its violation are: 1) that an entity is in the business of betting; 2) the entity is knowingly transmitting bets or information assisting in the placement of bets through a wire communication facility; 3) the bets are being transmitted in interstate or foreign commerce; and 4) that the betting business or bettors receive money or credit resulting from the bets. Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L. J. 667, 671 (1996). See generally Cabot, *supra* note 133, at 187.

164. Cabot, *supra* note 133, at 188. Some gambling from home on the Internet is not likely to face liability under the act. *Id.*

165. *Id.*

166. *Id.*

showing that part of the transmission occurred via a cable or wire would place the bet within the Wire Act.¹⁶⁷ The General Accounting Office (GAO), in its study of Internet Gambling, noted that while all Internet communication currently requires some type of telephone or data line, “future Internet communications may no longer be wire communications covered under the Wire Act.”¹⁶⁸ The GAO also stated that the language “transmission of a wire communication” is ambiguous because some courts have held that “transmission” means only sending information, not receiving it.¹⁶⁹

A major point of contention is whether the Wire Act applies to casino games and lotteries.¹⁷⁰ The statute refers to bets or wagers “on any sporting event or contest.”¹⁷¹ As gaming lawyer Anthony Cabot notes: “In 1961, the notion that persons could use the telephone to wager on anything but sporting events or horse racing was unrealistic. Thus, the bill drafters prohibited only the transmission of bets or wagers on sporting events or contests.”¹⁷² Cabot sees a strong argument that the Wire Act does not apply to casino games because the word “sporting” appears to apply to both “event” and “contest.”¹⁷³ Further, the legislative history of the Wire Act suggests an intent to affect sports betting.¹⁷⁴ Courts have interpreted the language as both including and excluding communication relating to casino games.¹⁷⁵

In addition to the Wire Act, the DOJ also stated that the Travel Act and the Illegal Gambling Business Act could be applied to media companies via the aiding and abetting statute.¹⁷⁶ The Travel Act, which, like the Wire Act, was

167. *Id.* Further, the statute does not limit the type of “wire” used, so that computer data lines probably fall within the Act. “[A]s long as the communication signal traverses a wire at some point on its journey from the sender to the receiver, the Wire Act becomes applicable.” Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, 49 (2004).

168. GAO REPORT, *supra* note 3, at 13.

169. *Id.* at 12–13.

170. NGISC REPORT, *supra* note 14, at 5-7 (stating that the Act “lacks clear definition of ‘contest’”).

171. 18 U.S.C. § 1084 (2000).

172. Cabot, *supra* note 133, at 188. Some gaming experts believe it is “generally accepted” that § 1084 does not apply to casino games. Cory Aronovitz & Mark D. Schopper, *U.S. Case Law*, in INTERNET GAMBLING REPORT, *supra* note 2, at 305, 305.

173. Cabot, *supra* note 133, at 189.

174. *Id.*

175. GAO REPORT, *supra* note 3, at 12; Walters, *supra*, note 137, at 344. One example of a court interpreting the Wire Act as prohibiting Internet casino gambling is *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 851 (Sup. Ct. N.Y. 1999), in which the Supreme Court of New York County held that the Wire Act, Travel Act, and Paraphernalia Act all prohibited the defendant’s offshore casino. *Id.*

176. NAB Letter, *supra* note 11. Gaming law experts state that the Professional and Amateur Sports Protection Act and the Interstate Transportation of Wagering Paraphernalia Act could apply to Internet gambling. Gottfried, *supra* note 167, at 51. The Interstate Transportation of Wagering Paraphernalia Act prohibits knowingly carrying or sending in interstate or foreign

intended to fight organized crime, outlaws travel or use of facilities in interstate or foreign commerce to conduct a business involving gambling that is illegal under state or federal law.¹⁷⁷ The Act encompasses transport of items as well as telephone lines carrying gambling information.¹⁷⁸ This law is relatively untested in federal courts, but may relate to a bigger section of the Internet gambling industry than the Wire Act does because it is not specific to sports betting.¹⁷⁹ It has been applied in New York to an online casino that took bets from New Yorkers.¹⁸⁰

The Illegal Gambling Business Act states that operation of an illegal gambling business under state law is also an offense under federal law.¹⁸¹ An illegal gambling business is one that involves five or more people who “conduct, finance, manage, supervise, direct or own all or part of such business” and “has been or remains in substantially continuous operation” for more than thirty days or has gross revenue of \$2,000 in any single day.¹⁸² This law has not yet been used to prosecute an Internet gambling enterprise, although it is “a likely candidate for future use.”¹⁸³ However, because the law is predicated on violation of an applicable state or federal law, it would require that the Internet casino operator be prosecuted under a state or federal law for Internet gambling offenses.¹⁸⁴

For the purposes of this scenario, a significant case that interprets the Wire Act as only applying to sports betting is *In re MasterCard International Inc.*¹⁸⁵ This case was decided in the U.S. District Court in the Eastern District of Louisiana, in the same circuit where Casino City’s complaint was filed. The plaintiffs had used credit cards to gamble online, and they filed a class-action lawsuit against MasterCard and Visa stating that they would not have gambled online had their credit cards not been accepted by the Internet casinos.¹⁸⁶ The plaintiffs brought RICO allegations against the defendant credit card companies, stating that the defendants were engaged in a worldwide gambling

commerce any paraphernalia or device to be used in illegal gambling activities. *Id.* The Professional and Amateur Sports Protection Act makes it illegal for states and tribes to offer betting on sporting events, but it has a grandfather clause for states that already allow sports betting. Wendy J. Johnson, *Trial Gaming Expansion in Oregon*, 37 WILLAMETTE L. REV. 399, 426 (2001).

177. 18 U.S.C. § 1952 (2000).

178. I. Nelson Rose, *Internet Gambling: Statutes and International Law*, 81 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS 233, 245 (2000).

179. Gottfried, *supra* note 167, at 52.

180. *Id.* (citing *Vacco*, 714 N.Y.S.2d at 851).

181. 18 U.S.C. § 1955 (2000); *see* Rose, *supra* note 178, at 244.

182. 18 U.S.C. § 1955.

183. Gottfried, *supra* note 167, at 53.

184. *Id.*

185. *See* Aronovitz & Schopper, *supra* note 172, at 319.

186. *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 474–75 (E.D. La. 2001).

enterprise through racketeering activity and collection of unlawful debt.¹⁸⁷ In granting the defendants' motion to dismiss, the court held that the Wire Act only applies to sports betting.¹⁸⁸ The court stated:

Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act.¹⁸⁹

The U.S. Court of Appeals for the Fifth Circuit affirmed the decision, stating that "the Wire Act does not prohibit non-sports internet gambling."¹⁹⁰ Casino City's complaint, it should be noted, refers to chilled speech concerning advertisements for both casino gambling and sports betting.¹⁹¹

There are, however, instances in which courts have decided that both Internet casino gambling and sports betting violate federal law. In a New York state case, *Vacco v. World Interactive Gaming Corp.*, the attorney general of New York sought to enjoin an Internet gambling company based in Antigua from offering its services to the state's residents.¹⁹² The court ruled that the Internet gambling company violated the Wire Act, the Travel Act, and the Paraphernalia Act.¹⁹³ The court did not limit the scope of the Wire Act to casino games.¹⁹⁴ The court stated that "[t]he Internet site creates a virtual casino within the user's computer terminal," and therefore "[b]y hosting this casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act and the Travel Act has occurred."¹⁹⁵

Some gambling experts, after *In re MasterCard*, believe that a change in federal law is now required for the DOJ to enforce the Wire Act against Internet gambling companies for offering games of chance or skill—casino games.¹⁹⁶ The DOJ strongly disagreed with the result of *In re MasterCard*¹⁹⁷

187. *Id.*

188. *Id.* at 480.

189. *Id.* at 481 (footnotes omitted).

190. *In re MasterCard Int'l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002). While this interpretation of the Wire Act is binding in the Fifth Circuit, it does not necessarily mean that Internet casinos are legal in those states. Aronovitz & Schopper, *supra* note 172, at 320. The tone of the Fifth Circuit's decision is that online gamblers cannot escape credit card debt from Internet casinos—in accruing such debt, they "got what they bargained for." *Id.* at 321.

191. Complaint, *supra* note 21, at 2.

192. 714 N.Y.S.2d 844, 847–48 (N.Y. 1999).

193. *Id.* at 851. "[T]he Wire Act, Travel Act and Paraphernalia Act all apply despite the fact that the betting instructions are transmitted from outside the United States over the Internet. The scope of these statutes clearly extends to the transmission of betting information to a foreign country . . ." *Id.*

194. *Id.* at 852.

195. *Id.*

196. Aronovitz & Schopper, *supra* note 172, at 319–20.

but conceded that the decision “is binding in this circuit.”¹⁹⁸ Therefore, a court would probably find that advertising Internet sports betting is an illegal activity and that Internet casino advertising is not. In other words, a company like Casino City could legally run the Internet casino advertisements, but not Internet sports betting advertisements.

That Casino City posts advertising on the Internet as opposed to some other medium does not change the final result. Casino City’s argument that its advertisements are aimed at a worldwide, Internet audience and should therefore be protected is ultimately unconvincing. Two of the cases on which Casino City relies—*Reno* and *Ashcroft*—dealt with statutes concerning obscene and indecent speech that may be constitutionally prohibited towards minors, but not towards adults absent certain circumstances.¹⁹⁹ It is within the context of prohibition of obscene speech that the Court in *Reno* made its statements about the Internet being a “vast platform from which to address and hear from a worldwide audience.”²⁰⁰ In those cases, the statutes at issue, COPA and the CDA, were struck down because of other issues, such as ambiguity and the availability of less-restrictive alternatives.²⁰¹ *Reno*, in fact, has been called “a relatively narrow decision [that] did little to establish the First Amendment parameters of the Internet.”²⁰² Casino City is concerned with commercial speech, and under *Pittsburgh Press*, any commercial speech about illegal activity may be prohibited.²⁰³ Therefore, Casino City’s complaint is distinguishable from *Reno* and *Ashcroft* because it deals with a type of speech that may constitutionally be denied to all parts of the population without regard to age.

This is the first time a federal court has expressly determined that section 1084 is restricted to wagering on sporting events or contests. . . . [I]t appears rather certain that federal law enforcement will not be able to prosecute Internet casinos under the strictures of the *Wire Act* for offering games of chance and skill.

Id.

197. DOJ Reply, *supra* note 38, at n.8.

198. *Id.*

199. *Reno v. ACLU*, 521 U.S. 844, 864–65 (1997). As Justice Stevens noted in his majority opinion in *Reno*, the government may prohibit selling to material to people under age seventeen on grounds that the material is “obscene as to them, even if it is not obscene as to adults.” *Id.* at 864.

200. *Id.* at 853.

201. *Id.* at 874 (applying the CDA); *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791–92 (2004) (applying COPA).

202. Todd G. Hartman, *The Marketplace vs. the Ideas: The First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 419, 426 (1999).

203. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973).

Swedenburg v. Kelly,²⁰⁴ another case on which Casino City relied, is also distinguishable. There, the court ruled that New York's statute was too broad because it encompassed some protected speech, such as legal advertising in other states.²⁰⁵ Here, however, commercial speech about Internet sports betting is, under the Wire Act, illegal in every state. Casino City seems to have argued on behalf of the rights of people in other countries to see its ads. Jack M. Balkin, a law professor who was interviewed by *BusinessWeek* about the Casino City complaint, indicated that U.S. courts are not interested in giving First Amendment protection to "[w]eb surfers beyond [the United States's] borders."²⁰⁶ It is entirely possible for a resident of Amsterdam to subscribe to *The New York Times*, yet no one would expect that newspaper to advertise products that are legal in the Netherlands but illegal in the United States. Further, when Casino City states that its advertisements are intended for a worldwide audience, that statement should be read with an implied wink. Practically speaking, Americans make up an estimated 50 to 70 percent of the Internet gambling customer base.²⁰⁷ A main purpose of marketing Internet gambling is to attract Americans' attention.²⁰⁸ The Internet is a new area of First Amendment law, but it seems unlikely that courts will overlook the illegality threshold of the *Central Hudson* test to allow Casino City to run advertising for Internet sports betting.

B. Prong Two: Substantial State Interest

Should Casino City succeed on the threshold question of the legality of Internet gambling, the court would consider the remainder of the *Central Hudson* test, including whether the government's interest in prohibiting the

204. 358 F.3d 223 (2d Cir. 2004).

205. *Swedenburg*, 358 F.3d at 240–41.

While the state can limit illegal sales of alcohol, section 102(1)(a) broadly encompasses protected speech. . . . [I]f plaintiff-appellees' wineries advertised on the Internet and included an order form that is lawful in their own states, the advertisement would be illegal in New York, even if it contained language limiting sales to states in which such orders were lawful.

Id.

206. Ante, *supra* note 21, at 84.

207. Parke & Griffiths, *supra* note 44, at 295.

208. For example:

United States citizens currently play a major role in supporting the Internet gambling industry. . . . In 1999, the United States players made up nearly 80 percent of Internet players. One Australian Internet gambling operator estimated that 98 percent of its players were persons from the United States.

Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 251, 252 (2003).

speech is substantial.²⁰⁹ The government bears the burden of proving its substantial interest.²¹⁰

1. Arguments

The Casino City complaint simply stated that the government has no substantial interest to justify the DOJ's imposition on commercial speech in this context.²¹¹ The DOJ, in its motion to dismiss, argued that the government has a substantial interest in enforcing its criminal laws and in reducing aid to gambling operations that violate those criminal laws.²¹² The DOJ pointed to three prior First Amendment cases in which the Supreme Court held that the state has a substantial interest in reducing gambling through laws that address advertisement of gambling.²¹³ Those cases are *United States v. Edge Broadcasting Co.*, *Greater New Orleans Broadcasting Association Inc. v. United States*, and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.²¹⁴

In *Posadas*, the Court had “no difficulty” concluding that the Puerto Rico Legislature had a substantial interest in banning casino advertisements which targeted local residents.²¹⁵ The Court quoted the Tourism Company's brief as saying that excessive casino gambling among locals would produce serious harmful effects on their health, safety, and welfare.²¹⁶ The Court stated that these same concerns are what motivate states to ban gambling entirely.²¹⁷ In *Edge*, the Court held that the federal government has a substantial interest in supporting states that do not want lotteries within their borders, as well as those that do permit lotteries, by allowing states to disallow lottery advertising on the radio.²¹⁸

In *Greater New Orleans*, the Court wrote that “[n]o one seriously doubts” that the federal government may have a substantial interest in reducing the social problems that the Solicitor General, in that case, attributed to gambling.²¹⁹ Moreover, the DOJ emphasized that in all three of those cases,

209. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

210. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999).

211. Complaint, *supra* note 21, at 4.

212. DOJ Motion to Dismiss, *supra* note 29, at 19–20.

213. *Id.* at 20.

214. *Id.*

215. *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986).

216. *Id.*

217. *Id.*

218. *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

219. DOJ Motion to Dismiss, *supra* note 29, at 20 (quoting *Greater New Orleans Broad. Ass'n v. United States* 527 U.S. 173, 186 (1999)); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 185–86 (quoting the Solicitor General as stating that gambling is “a regressive tax on the poor” and leads to corruption, organized crime, bribery, narcotics trafficking, economic losses to

the advertising in question related to legal gambling—in contrast to Internet gambling advertising, which “[w]ith very few exceptions limited to licensed sportsbook operations in Nevada,” is prohibited by state and federal law.²²⁰

The DOJ rounded out its argument on the subject of substantial interest by noting that Internet gambling is “particularly pernicious” because it can be accessed easily by anyone, even children and compulsive gamblers.²²¹ Additionally, there is “potential for fraud and money laundering.”²²² The DOJ quoted title 14, section 90 of the Louisiana Revised Statutes, which prohibits gambling by computer. This statute notes in its introductory section that the state legislature is responsible for protecting its citizens, especially children and those with an addiction to gambling, from the increased availability of gambling services.²²³

In Casino City’s response to the DOJ’s motion to dismiss, it argued that the three cases relied on by the DOJ under the “substantial interest” prong were further along in their proceedings than the present litigation, and were being reviewed after summary judgment, or other relief, was either granted or denied.²²⁴ Casino City also argues that in *Greater New Orleans*, while the Court did find a substantial state interest in regulating gambling advertising, it held that finding was “by no means self-evident.”²²⁵ In that decision, the Court also noted that sometimes the social ills caused by gambling are offset by economic benefits.²²⁶ In this litigation, Casino City argued, “It is just too early to determine that such interests are self-evident.”²²⁷ Casino City also noted that the Louisiana computer gambling statute provides that advertising computer gambling does not violate the statute against computer gambling in Louisiana.²²⁸

gamblers, their families, communities, and government as well as street, white-collar, and organized crime).

220. DOJ Motion to Dismiss, *supra* note 29, at 20–21 (quoting NAB Letter, *supra* note 11).

221. *Id.* at 21.

222. *Id.*

223. *Id.*; see LA. REV. STAT. ANN. § 14:90.3 (2004).

224. Casino City Response, *supra* note 34, at 23.

225. *Id.* at 23–24 (quoting *Greater New Orleans*, 527 U.S. at 186).

226. Casino City Response, *supra* note 34, at 24.

227. *Id.* In the DOJ’s Reply Brief in Support of Defendant’s Motion to Dismiss, which was filed after Casino City’s response, the DOJ reiterated that the Supreme Court on three separate occasions has found that there is a substantial interest in reducing even legal gambling. DOJ Reply, *supra* note 38, at 12. “In any event, whatever the federal government’s interest in reducing legal gambling activity, there is no basis for contending that the government lacks a substantial interest in enforcing laws proscribing illegal gambling,” the DOJ stated. *Id.*

228. Casino City Response, *supra* note 34, at 24. The DOJ, in its Reply Brief, noted that it was relying on the Louisiana computer gambling statute because its preamble points out the easy accessibility of it. DOJ Reply, *supra* note 38, at 13.

2. Analysis

Both precedent and social factors relating to Internet gambling seem to be in favor of the DOJ. First, *Greater New Orleans* does not seem to point to a certain conclusion that a state could potentially *not* have a substantial interest in reducing gambling, so much as it makes the government's case harder to prove. The Court noted that Congress has declined to adopt a national policy against gambling.²²⁹ If there is any policy, it is to leave the matter to the states.²³⁰

Additionally, Congress has actually allowed the proliferation of new gambling opportunities, including sanctioning American Indian gaming and enacting statutes that "reflect approval of state legislation" that allows for activities like casino gambling and lotteries.²³¹ In a footnote, the Court took a survey of legal gambling, and found that some form of it is available in thirty-seven states and the District of Columbia.²³² Today, gambling is legal in all but two states—Utah and Hawaii.²³³ This is what it seems the Court was referring to when it stated that federal gambling policy is "decidedly equivocal."²³⁴ The federal government, on the other hand, has displayed no equivocation when it comes to Internet gambling. Congress has passed no laws allowing states to license and regulate Internet gambling, and no agreements have been forged with Native American tribes giving them the right to operate gambling Web sites. The executive branch, through the DOJ, interprets federal law to prohibit all Internet gambling. Only one state, Nevada, has passed legislation allowing for the development of regulations of Internet gambling.²³⁵ However, due to federal gambling laws and the lack of an ability to confine online gambling within its borders, Nevada has never passed enabling regulations.²³⁶ These facts make it seem likely that a court could find that the DOJ does have a substantial interest in prohibiting Internet gambling and the social ills that are particular to it.

229. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999).

230. *Id.*

231. *Id.* at 187.

232. *Id.* at 186 n.5.

233. *All Bets Are On*, *ECONOMIST*, Oct. 2, 2004, at 68. Thirty-nine U.S. states allow lotteries; thirty-four states allow casinos. *Id.*

234. *Greater New Orleans*, 527 U.S. at 187.

235. See Jeff Simpson, *Gaming Regulators Seek Legal Advice*, *LAS VEGAS REV.-J.*, June 30, 2001, at 3D.

236. See Terry Lane, *Nev. Questions Interstate Internet Gambling Legality*, *WASH. INTERNET DAILY*, Mar. 25, 2002, (page number unavailable). In June 2002, the Nevada legislature passed a law that would allow casinos meeting certain requirements to operate Internet gambling Web sites. *Id.* Built into the law was a requirement that the Nevada Gaming Control Board could not approve any online gambling sites until technology was available to filter out minors, ensure fairness of the games, and determine in what state a user is located. *Id.*

Additionally, the social issues that inevitably come up in any discussion of Internet gambling probably justify a substantial interest in reducing or prohibiting the advertising of Internet gambling. Four widely cited problems related to Internet gambling are fraud, money laundering, gambling addiction, and underage gambling.²³⁷

The potential for fraud is present in Internet gambling because the player has little independent assurance that the games are fair or that he will be paid if he wins.²³⁸ There is also the possibility that unscrupulous Internet gambling operators will take advantage of players' credit card numbers or other sensitive information.²³⁹ Money laundering is another issue. An Internet casino could aid a money launderer by allowing him or her to deposit money via credit card or wire transfer into an account with the casino, gamble with some of the money, and then withdraw the money from the account.²⁴⁰ Internet casinos operating in jurisdictions that provide only loose or nonexistent regulation may not have the same money laundering oversight control as land-based gambling operations.²⁴¹ The GAO Report stated that the FBI believes Internet gambling to be a money laundering risk.²⁴² However, the report also stated that banking and gaming regulatory officials did not believe Internet gambling to present a money laundering risk.²⁴³ The CEO of BETonSPORTS.com, David Carruthers, called the idea that money could be laundered through Web casinos "hogwash."²⁴⁴ He went further to state, "The very nature of the Internet is that every transaction is completely auditable from beginning to end. Every keystroke is logged into our system. We are more auditable, more

237. Gottfried, *supra* note 167, at 15–37.

238. *Id.* at 16. With sports betting, however, the customer can independently verify the outcome of the game and will thus know if he won or lost money. NGISC REPORT, *supra* note 14, at 5-3.

239. NGISC REPORT, *supra* note 14, at 5-5. Additionally, computer hackers may be able to manipulate games. *Id.*

240. Gottfried, *supra* note 167, at 17 (stating that Internet gambling sites could help with the "layering" phase of money laundering).

To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small percent of the original funds, then cash out the remaining funds. Through the dual protection of encryption and anonymity, much of this activity can take place undetected.

NGISC REPORT, *supra* note 14, at 5-6.

241. See NGISC REPORT, *supra* note 14, at 5-5, for the proposition that "[I]ack of accountability also raises the potential for criminal activities, which can occur in several ways."

242. GAO REPORT, *supra* note 3, at 35–37. In 2002 the FBI said it had two open cases involving Internet gambling as a vehicle for money laundering, and a Financial Action Task Force report in 2001 stated that some of its member jurisdictions had evidence of Internet gambling being used to launder money. *Id.* at 35–36.

243. *Id.* at 37.

244. *American Citizens Want to Gamble on the Internet*, BUS. WK., Dec. 20, 2004, at 66.

scrupulously clean than the land-based operators.”²⁴⁵ It should be pointed out that many Internet gambling companies are publicly traded on foreign markets and some are also members of the Interactive Gaming Council, a trade organization for the industry.²⁴⁶ Clearly, law enforcement and business representatives disagree about the potential for money laundering in Internet gambling.

Gambling addiction and underage gambling are also areas of concern. Pathological gambling, or gambling addiction, is classified as a disorder by the *Diagnostic and Statistical Manual of Mental Disorders IV*.²⁴⁷ The National Gambling Impact Study Commission Report cites a 1997 analysis by the Harvard Medical School Division on Addictions as finding that there are about 125 million Americans who gamble, and of them, 7.5 million are either problem or pathological gamblers.²⁴⁸ Mark Griffiths, a professor of gambling studies at the International Gaming Research Unit at Nottingham Trent University, stated that social environment and the design of the gambling activity are factors in determining how people become addicted to gambling.²⁴⁹ There are a variety of features of Internet gambling that distinguish it from traditional gambling. Most of them seem to weigh against the interests of a problem gambler.²⁵⁰ These features include: round-the-clock access, ability to gamble during the work day, lower initial wagers, and the greater use of

245. *Id.*

246. PartyGaming, owner of top poker Web site PartyPoker.com, went public on the London Stock Exchange in July of 2005; it was valued at \$10 billion. Peter Gumbel, *How the U.S. Is Getting Beat in Online Gambling*, TIME, Nov. 28, 2005, A1, at A2. MGM Mirage at one time operated an offshore Internet gambling site, but shut the site down because it could not take bets from U.S. players and was therefore losing money. *60 Minutes* (CBS television broadcast Nov. 20, 2005). For information on the Interactive Gaming Council, see Interactive Gaming Council, *About Us*, <http://www.igcouncil.org/aboutus.php> (last visited Feb. 18, 2006).

247. Gottfried, *supra* note 167, at 30–31 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31 (4th ed. 2000)).

248. NGISC REPORT, *supra* note 14, at 4-1. Pathological gambling is defined, according to the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), as an impulse control disorder. *Id.* The DSM-IV lists ten criteria used in diagnosis, including “repeated unsuccessful efforts to control, cut back or stop gambling” and committing “illegal acts such as forgery, fraud, theft or embezzlement to finance gambling.” *Id.* A “problem gambler,” by contrast, experiences adverse consequences that fall below the threshold of at least five of the ten criteria used to diagnose pathological gambling. *Id.*

249. *Gamblers’ Brains Addiction Clue*, BBC News, Jan. 10, 2005, at <http://news.bbc.co.uk/1/hi/health/4154709.stm>; see also Gary Rivlin, *The Chrome-Shiny, Lights-Flashing, Wheel-Spinning, Touch-Screened, Drew-Carey-Wisecracking, Video-Playing, ‘Sound Events’-Packed, Pulse-Quickening Bandit*, N.Y. TIMES MAG., May 9, 2004, at 46–47. Howard Shaffer, the director of the Division on Addictions at Harvard Medical School, said that when humans are confronted with a situation in which they will be rewarded intermittently, such as with a slot machine, they will pursue winning with a “persistent tenacity. That hard-wiring that nature gave us didn’t anticipate electronic gaming devices.” *Id.* at 47.

250. Cabot, *supra* note 133, at 182.

technology by young people.²⁵¹ Internet gambling is a concern for groups that treat gambling addiction, such as the National Council on Problem Gambling.²⁵² Keith Whyte, the group's executive director, said risks unique to online gambling include social isolation and unlimited access.²⁵³ For these reasons, Internet gambling has been referred to as the "crack cocaine of gambling" by legislators who want to ban the activity in the United States.²⁵⁴

Regarding underage gambling, the National Gambling Impact Study Commission Report stated that an estimated 7.9 million American adolescents have problem or pathological gambling addiction.²⁵⁵ In 1998, two gambling addiction researchers at the University of Minnesota, Randy Stinchfield and Ken C. Winters, wrote that one possible way to prevent gambling addiction among adolescents is for the government and the gambling industry to monitor gambling advertisements, which only present the positive side of gambling.²⁵⁶ "While most adults are able to see through this veneer, many adolescents may not be," they wrote.²⁵⁷ Internet gambling in particular is attractive to teenagers, both because most teenagers are Web-savvy, and because many Internet gambling sites feature graphics and sound that blur the line between gambling and video gaming.²⁵⁸ A recent test by Gamcare, a British group that promotes responsible gaming, found that only seven of thirty-seven gambling Web sites prevented a 16-year-old from registering to gamble online.²⁵⁹

For the most part, the same concerns that have been discussed regarding Internet gambling were listed by the government in *Greater New Orleans* as reasons for its substantial interest in prohibiting broadcast of casino advertisements.²⁶⁰ There, the Supreme Court found a substantial interest, but expressed some hesitation about it. Gambling, the Court stated, sometimes

251. *Id.*

252. Andrea Orr, *Online Poker's Flush with Success as More Folks Deal Themselves In*, INVESTOR'S BUS. DAILY, Oct. 1, 2004, at A04.

253. *Id.*

254. *House Bid to Curb Internet Gambling Yields Tangled Web of Legislation*, ELECTRONIC COM. NEWS, June 9, 2003 (page number unavailable) (quoting Rep. Howard Coble as saying, "Virtual casinos and their video game structure have been labeled the crack cocaine of gambling.").

255. NGISC REPORT, *supra* note 14, at 4-1.

256. Randy Stinchfield & Ken C. Winters, *Gambling and Problem Gambling Among Youths*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 172, 183 (1998).

257. *Id.*

258. Jeffrey L. Derevensky et al., *Adolescent Problem Gaming: Legislative and Policy Decisions*, 8 GAMING L. REV. 107, 112 (2004). Additionally, "[p]roblem and pathological gambling amongst adolescents has been shown to result in increased delinquency and crime, the disruption of familial relationships and multiple mental health, legal, academic and behavioral problems." *Id.* at 109.

259. *All Bets Are On*, *supra* note 233, at 69.

260. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 185 (1999).

comes with economic benefits that can balance the costs.²⁶¹ However, Internet gambling doesn't provide an economic benefit in the United States in the way land-based casinos do.²⁶² It provides no jobs for casino and hotel staff and no tax dollars for schools and government programs. All the monetary benefits to Internet gambling flow offshore.²⁶³ Given the ease with which the Court has in the past found a substantial interest in prohibiting speech about gambling, combined with the significant possible social detriments associated with Internet gambling, it seems likely that the Court could rule in favor of the DOJ on the subject of substantial interest.

C. Prong Three: Direct Advancement of Asserted Interest

A court must next determine whether the regulation directly advances the asserted governmental interest.²⁶⁴ In their pleadings and memoranda, the parties did not focus as much attention on this prong as they did on the other prongs.²⁶⁵

1. Arguments

In its complaint, Casino City stated that the DOJ's threat to prosecute advertisers of Internet gambling on a theory of aiding and abetting liability does not directly advance a government interest.²⁶⁶ In its motion to dismiss, the DOJ argued that the government interest is directly advanced because the DOJ, by "punishing and deterring" such advertising, is reducing the ability of gambling Web sites to attract customers.²⁶⁷ In response, Casino City called this argument "legally insufficient" in light of the holding in *Greater New Orleans* that to satisfy this element of the test, the government needs to show that the harms it recites are real and that the speech restriction will "alleviate them to a material degree."²⁶⁸ Casino City argued that the DOJ has evidence of neither a harm nor alleviation of a speculative harm to a material degree.²⁶⁹ In fact, Web sites not based in the United States are free to carry Internet

261. *Id.*

262. Gambling attorney Anthony Cabot said the United States is losing about \$7 billion per year by outlawing Internet gambling. Gumbel, *supra* note 246, at A3.

263. See Watson et al., *supra* note 10, at 209. "Countries that authorize Internet gambling and draw financial resources from it have little motivation to enforce U.S. antigambling laws." *Id.* at 210.

264. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

265. See Complaint, *supra* note 21; DOJ Motion to Dismiss, *supra* note 29; Casino City Response, *supra* note 34; DOJ Reply, *supra* note 38.

266. Complaint, *supra* note 21, at 4.

267. DOJ Motion to Dismiss, *supra* note 29, at 22.

268. Casino City Response, *supra* note 34, at 25. Casino City stated that "[c]onjecture is all that the DOJ has to offer" on this prong. *Id.*

269. *Id.*

gambling advertising that will be accessible to Americans. Therefore, prohibiting online gambling advertising in the United States wouldn't wholly deprive Americans of Internet gambling marketing.²⁷⁰ The DOJ responded by pointing out that reducing advertising for an activity will reduce the prevalence of the activity itself.²⁷¹

2. Analysis

Taking into account the rather limited amount of information contained in the pleadings about direct advancement of the state interest, the DOJ in a future case may fail to prove this prong of the *Central Hudson* test. According to *Edenfield v. Fane*, the government's burden to show material alleviation of a harm will not be met by "mere speculation or conjecture."²⁷² In many commercial speech cases, if the government loses the case, the "direct advancement" element is the element that the government fails to meet.²⁷³ In *Greater New Orleans*—a case about broadcast advertising of casinos—the Supreme Court didn't fully buy the government's argument that an advertising ban would directly advance its substantial interest in reducing the social costs of gambling. Justice Stevens wrote:

Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another.²⁷⁴

Additionally, Stevens pointed out that the effectiveness of the ban must be considered in light of the fact that the federal government was simultaneously encouraging tribal casino gambling.²⁷⁵

270. *Id.* at 25–26 (stating that "[b]anning U.S. portals from carrying Internet gaming advertisements does little if anything to remove the advertisements from the Internet as foreign based portals will continue to carry them unabated").

271. DOJ Reply, *supra* note 38, at 13 ("[T]he connection between advertising an activity and increased incidence of the activity is the very reason that Internet gambling businesses pay Casino City to advertise for them . . .").

272. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

273. *ROME & ROBERTS*, *supra* note 48, at 120–21.

[P]ractically all of the state restrictions on commercial speech which the Supreme Court has invalidated have been voided not on the ground that the state interest was insufficiently important or substantial but because the means selected to advance that interest was not directly related to the governmental interest, even if it were assumed that the state interest had qualified as a substantial one.

Id.

274. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999).

275. *Id.*

Here, it seems difficult to assume that the DOJ crackdown on advertising subsequent to the NAB letter in 2003 has either stemmed the appetite for Internet gambling among Americans or materially furthered the government's interest in reducing illegal gambling. In fact, it seems that the popularity of Internet gambling is only growing.²⁷⁶ In 2003, \$10 million was spent on Internet gambling advertising; in 2002, it went from 11th to 5th place in overall Internet ad impressions.²⁷⁷ PokerRoom.com, which is second in size to PartyPoker.com, had a 60 percent increase in business in 2004, and 80 percent of its 2.5 million users are in the United States.²⁷⁸ At cardplayerpoker.com, a free-play site, "the Internet numbers are doubling every three or four months, and have been for several years now."²⁷⁹ BETonSPORTS.com expected to add 50,000 new customers to its existing 1.2 million customers by the end of 2004.²⁸⁰ The publication *In Business Las Vegas* reported that Internet gambling operators are "winning the advertising war" by increasing spending "on everything from sponsorships to the kinds of traditional marketing campaigns reserved for major product brands."²⁸¹ This includes advertising on cable television, billboards, and sponsoring a Formula One team in Europe and fighters in the Ultimate Fighting Championship.²⁸² Estimates of Internet gambling companies' revenue vary, and it is problematic, given the lack of regulation or reporting requirements, to get a firm grasp on whether the efforts

276. Kathy Kristoff, *Online Gambling Makes It Easy to Lose Shirt*, TULSA WORLD, Oct. 10, 2004, at E3 (quoting gambling industry statistician Sebastian Sinclair as saying, "The fundamental factor that's driving this industry is demand. . . . And there is tremendous demand that will make Internet gambling difficult to stop.>").

277. Richard Williamson, *Online Casinos Await Answer from DOJ*, ADWEEK, Oct. 18, 2004, at 13.

278. Orr, *supra* note 252.

279. *Poker's Growing Stakes*, BUS. WK. ONLINE, Apr. 8, 2004, <http://www.msnbc.msn.com/id/4694939>. The recent growth in popularity of poker has been attributed both to the Internet and the cable broadcast of the World Poker Tour. "Poker is seen as a competition and a sport now, not as gambling per se," said Mike Sexton, a commentator for the World Poker Tour. Walter Kim & Jeffrey Ressler, *Hot Game in Town: Poker's New Face*, TIME, July 26, 2004, at 30.

280. Peter John, *Betonsports Puts Its Money on Weathering Hurricane Season*, FIN. TIMES, Oct. 15, 2004, at 23. The company's new real-time poker site gained 700 new users within its first four hours of operation. *Id.* Likewise, Sportingbet, a U.K. company that offers online sports betting, poker, and casino games to a clientele that is 70 percent American, added 76,000 new customers in the four-month period ending in July 2004 and will likely have profits of at least £25 million this year. Peter Shearlock, *Company Spotlight: One Business Makes the Internet a Really Safe Bet*, THE INDEPENDENT (London), Aug. 21, 2004, at 10.

281. Liz Benston, *Online Casinos Continue Marketing Push*, IN BUS. LAS VEGAS, Dec. 17, 2004, at 15.

282. *Id.* Online casinos and sports books are also making use of nontraditional marketing. *Id.* GoldenPalace.com has tried to insert itself into headlines by paying streakers to run through sporting events with its name painted on their bodies, and also sponsored a private Canadian team trying to build a space craft. Eli Kintisch, *SpaceShipOne Now Has Eye on the Prize*, ST. LOUIS POST-DISPATCH, Sept. 24, 2004 at A1.

of the DOJ have caused Americans to spend less money on gambling.²⁸³ But regardless of whether or not Americans are spending less money on Internet gambling, the increase in sign-ups at gambling Web sites at least suggests that more Americans are learning about the sites and checking them out.²⁸⁴ Much like in *Greater New Orleans*, the ban on advertising doesn't seem to directly advance the DOJ's interests, because it seems to have done little to reduce the interest in Internet gambling among Americans. Thus, it seems that the DOJ has not proven its point, at least according to the pleadings, on this prong of the *Central Hudson* test.

D. Prong Four: Restriction Not More Extensive than Necessary

The final prong of the *Central Hudson* test requires that the government's prohibition of commercial speech be no more extensive than necessary to serve the asserted purpose.²⁸⁵ Again, the pleadings are considerably briefer on this topic than they are on first two prongs of the *Central Hudson* test.

1. Arguments

Casino City's complaint stated that the threatened application of federal law against companies that advertise Internet gambling "is not narrowly drawn to effectuate any purported government interest."²⁸⁶ The DOJ's motion to dismiss argued that its prohibition on Internet gambling advertisements could not be any more narrowly tailored because it only targeted illegal Internet gambling that would violate 18 U.S.C. § 2, the aiding and abetting statute.²⁸⁷ Casino City, in its reply, argued that the DOJ had not provided any evidence for its contention, and that although Casino City was not required to do so, it should be given an opportunity to show the court alternative measures that would achieve the government's interest less intrusively than the challenged

283. Internet gambling revenue topped \$7 billion in 2004. *Curbing Internet Gambling*, CHRISTIAN SCI. MONITOR, Jan. 6, 2005, at 8. Christian Capital Advisors projects revenue to rise to \$9.8 billion in 2005. *Id.* By 2018, it predicts yearly revenue of \$18.4 billion. *Id.* "Our revenues are greater than Yahoo!'s. Our profits are greater than Amazon's. It's ridiculous," said Alex Czajkowski, marketing director of Sportingbet PLC, a company that had a \$39.5 million operating profit last fiscal year. Lorraine Woellert, *Can Online Betting Change Its Luck?*, BUS. WK., Dec. 20, 2004, at 66.

284. "At least three factors have lead to the popularity of Internet gambling": It is anonymous and does not require travel; it is a low-cost business to run; and the U.S. public generally accepts gambling. Watson et al., *supra* note 10, at 209. For the ever-increasing popularity of Web gambling, especially poker, see Gumbel, *supra* note 246; *American Citizens Want to Gamble on the Internet*, BUS. WK., Dec. 20, 2004, at 67.

285. *Cent. Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

286. Complaint, *supra* note 21, at 4.

287. DOJ Motion to Dismiss, *supra* note 29, at 22.

restriction.²⁸⁸ The DOJ, in response, observed that Casino City did not put forth any alternatives in its response to the motion to dismiss.²⁸⁹ Without any suggestions from Casino City about how the government could accomplish its goal of cutting down on the ability of Internet gambling sites to solicit U.S. customers, the DOJ argued that its motion to dismiss should be granted.²⁹⁰

2. Analysis

As previously described, the government is not required to employ the least restrictive means conceivable; it must, however, make sure that the speech restriction is reasonably tailored to promote the asserted interest.²⁹¹ In *44 Liquormart*, the Court struck down Rhode Island's law against publishing the price of liquor in an advertisement.²⁹² In authoring the majority opinion, Justice Stevens found that there were other methods to achieve the state's objective of promoting temperance that did not involve any restriction on speech, such as maintenance of high prices through direct regulation or an increased alcohol tax.²⁹³ Similarly, in *Rubin v. Coors Brewing Co.*,²⁹⁴ the Court decided that the government's substantial interest in suppressing strength wars in the beer market did not warrant a ban on beer labels which disclose alcohol content.²⁹⁵ The majority opinion expressed that there were a variety of regulatory options available, such as directly limiting the alcohol content of beer, which did not implicate speech.²⁹⁶

The DOJ seemed to identify the substantial interests here as enforcement of criminal laws and reducing aid to illegal gambling companies, as well as reducing gambling by reducing gambling advertising.²⁹⁷ Again, the overall question of whether Internet sports betting and casino gambling are legal reared its head. Under the DOJ's approach, both casino games and betting on the Web are deemed illegal.²⁹⁸ Therefore, it would seem that the DOJ's warning against Internet gambling advertising is not simply one of the least

288. Casino City Response, *supra* note 34, at 26.

289. DOJ Reply, *supra* note 38, at 14.

290. *Id.*

291. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (citing *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

292. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

293. *Id.* Stevens also suggested that per capita purchases could be limited, such as with prescription drugs, or the state could promote an anti-drinking message through educational campaigns. *Id.*

294. 514 U.S. 476 (1995).

295. *Id.* at 490–91.

296. *Id.* “[R]espondent suggests several alternatives . . . We agree that the availability of all these options, all of which could advance the Government's asserted interest . . . indicates that [the law in question] is more extensive than necessary.” *Id.*

297. DOJ Motion to Dismiss, *supra* note 29, at 20.

298. NAB Letter, *supra* note 11.

restrictive means available, but possibly one of a very few means available to prevent Internet gambling operators from offering their services to Americans.²⁹⁹ To enforce the Wire Act against the Internet gambling industry, it seems that prosecutors must go after advertisers and payment processing services.³⁰⁰ Under these conditions, a court could find that a speech restriction is reasonably tailored to serve the asserted interest.³⁰¹ However, if a court views Internet casino gambling as not expressly illegal under federal law—i.e., that federal law only prohibits Internet sports gambling, via the Wire Act and the holding in *In re MasterCard*—restricting advertising about Internet casino gambling could be less of a reasonable fit. In that scenario, it seems that the DOJ's interest in reducing illegal gambling and the social problems associated with gambling could be achieved by strict regulation of the Internet gambling industry.³⁰² Such regulation could require casino and betting Web sites to use identity verification software to keep tabs on who customers are and how much they are gambling. Thus, a court's ruling on the fourth prong may depend on whether it considers both Internet casino gambling and sports betting to be an illegal activity.

IV. CONCLUSION

If this issue comes before a court again, it is conceivable that a court could rule that a company like Casino City may advertise Internet casinos but not Internet sports betting Web sites. Under Fifth Circuit precedent established in *In re MasterCard*, the Wire Act forbids taking sports bets via the Internet, but not offering casino gambling via the Internet.³⁰³ Therefore, the company

299. Because many Internet gambling companies are located in offshore jurisdictions, it is difficult for the United States to enforce its laws against them. "To effectively prohibit Internet gambling, the U.S. government would have to ensure that these . . . operators do not offer their services within U.S. borders, a proposition that poses a range of unanswered questions regarding feasibility." NGISC REPORT, *supra* note 14, at 5-10. One feasibility problem is that it is easy to change the address of a Web site, which consists of a chain of numbers, and doing so makes it difficult to track the physical location of the company using the Web site. *Id.* at 5-11.

300. "Companies that do business with offshore-based gambling Web sites have been subject to pressure and prosecution from the U.S. government." Watson et al., *supra* note 10, at 210. PayPal agreed to pay \$10 million to settle the DOJ's claim that it was violating the Wire Act by facilitating Internet gambling transactions. *Id.*

301. However, if the Court determines that both casino and sports betting on the Internet are illegal conduct, under the first prong of *Central Hudson*, then the government will automatically have the right to prohibit advertising of them because there is no First Amendment right to advertise illegal activity. *Cent. Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

302. "[Legalization will allow] strict legislative scrutiny of all provisions and enable lawmakers to delegate the appropriate authority to those who can enforce the regulations effectively." Friedrich, *supra* note 10, at 370.

303. *In re MasterCard Int'l, Inc.*, 313 F.3d 257, 262 (5th Cir. 2002).

would not be advertising illegal conduct, under *In re MasterCard*, if it ran online casino advertisements. However, the government may still restrict online casino advertisements if it satisfies the remaining prongs of the *Central Hudson* test. Under the *Central Hudson* test, once the legality of the advertised conduct has been established, a court must then consider whether the government has a substantial interest in prohibiting the commercial speech, whether the government's restriction materially advances the asserted interest, and whether the government's restriction is no more extensive than necessary.³⁰⁴ The potential social ills associated with Internet gambling, such as gambling addiction and the opportunity for fraud, probably justify the DOJ's substantial interest in restricting Internet gambling advertising. However, because of the ever-increasing popularity of Internet gambling, especially Internet poker, and because Internet gambling is still being marketed to American consumers via methods like sports sponsorships, a court could find that the DOJ's restriction has not materially advanced its interest. Lastly, concerning whether the speech restriction is no more extensive than necessary, a court's decision will probably depend on whether it considers online casino gambling a legal activity. Because Internet gambling operations are based offshore, though, it is possible that a court could find that the advertising prohibition is the only method for the DOJ to enforce the government interest in reduced gambling. Therefore, assuming that a court determines Internet casino gambling to be lawful and that the government's restriction does not materially advance its interest, it is conceivable that a future complainant may establish the right to advertise Internet casinos.

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304. *Cent. Hudson*, 447 U.S. at 56.

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