# PROHIBITING CASINOS FROM ADVERTISING: THE IRRATIONAL APPLICATION OF 18 U.S.C. § 1304

Richard Shawn Oliphant

## I. INTRODUCTION

Title 18 U.S.C. § 1304 prohibits the broadcast of "any advertisement of or information concerning any lottery."[1] The historical underpinnings of this statute reveal that it was enacted to promote consistency with postal prohibitions placed on traditional lotteries[2] in the early 1800s.[3] However, the statute is no longer applied to traditional lotteries conducted by the states[4]—the very reason it was enacted in the first place.[5] Nor does the statute apply to lotteries operated by the government,[6] charitable lotteries,[7] lotteries conducted by any

---

1. 18 U.S.C. § 1304 (1984 & Supp. 1996) provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year or both.
>
> Each day's broadcasting shall constitute separate offenses.

2. The Supreme Court has recognized a typical lottery as a scheme in which tickets are sold and prizes are awarded among the ticketholders by lot. FCC v. American Broadcasting Co., 347 U.S. 284, 291 n.8 (1954).

3. *See infra* notes 48–69 and accompanying text.

4. *See infra* note 72 (discussing the effect of 18 U.S.C. § 1307(a)(1) (1984 & Supp. 1996)).

5. *See infra* notes 48–69 and accompanying text.

6. 18 U.S.C. § 1307(a) (1984 & Supp. 1996) provides that §§ 1301–1304 do not apply to:

> (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to--
>
> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is--
>
> (A) contained in a publication published in that State or in a State which conducts such a lottery; or
>
> (B) broadcast by a radio or television station licensed to location in that State or a state which conducts a lottery; or
>
> (2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is--
>
> (A) conducted by a not-for-profit organization [tax exempt under § 501 of the IRS code] or a governmental organization; or

commercial organization as a promotion which "is clearly occasional and ancillary to the primary business of that organization,"[8] or advertisements for placing wagers on sporting events[9] and fishing contests.[10] Moreover, all forms of Indian gaming are exempted from the statute's ban.[11] This covers more than 225 Indian gambling establishments run by some 200 Indian tribes.[12] Some of these Indian-run casinos reap $2 million a day in gambling revenue,[13] yet they are all free to advertise,[14] even in states which do not allow any forms of casino gambling.[15] This is true even if the Indian casino is operated by a private company, such as Harrah's,[16] which also owns non-Indian casinos.

In spite of all these exemptions, the same statute which prohibits "lottery" advertisements[17] has recently been used to ban broadcasters from advertising information concerning privately owned casinos,[18] even though such casinos are authorized by state law.[19] The Federal Communications Commission (FCC), the statute's enforcement agency, justifies the use of the statute to ban private casino advertisements by claiming a federal interest in "retarding the growth of private gambling which has been associated with harmful social effects including the spread of organized crime."[20]

---

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

7. *Id.*

8. *Id.*

9. 18 U.S.C. § 1307(d) (1984 & Supp. 1996); 47 C.F.R. § 73.1211.

10. 18 U.S.C. § 1305 (1984); 47 C.F.R. § 73.1211.

11. 25 U.S.C. § 2720 (West Supp. 1984–1995) provides: "Consistent with the requirements of this Chapter, [Indian Gaming Regulatory Act] sections 1301, 1302, 1303 and 1304 of Title 18 [United States Code] shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter."

12. Testimony of Anthony J. Hope, Chairman, National Indian Gaming Comm'n, *Before the Senate Comm. on Indian Affairs*, Federal News Serv., May 17, 1994, *available in* LEXIS, News Library, Fednew File.

13. *See* Kirk Johnson, *New Game for Pequots: Party Politics*, N.Y. TIMES, Aug. 30, 1994, at B2.

14. *See* 25 U.S.C. § 2720.

15. *See* John Crigler et al., *Why Sparky Can't Bark—A Study of the Ban on Broadcast Advertisements for Lotteries*, 2 COMMLAW CONSPECTUS 43, 53 (1994) (citing NATIONAL ASSOCIATION OF BROADCASTERS, LOTTERIES AND CONTESTS, A BROADCASTERS HANDBOOK, 13 (3d ed. 1990)). "Not only is immediate (unless prohibited under state law) in-state advertising of these games generally allowed, but cross-border broadcasts (e.g., advertisements of Indian bingo conducted in one State carried by stations in another) also now are allowed." *Id.* at 53 n.115.

16. Harrah's Entertainment, owns and operates non-Indian casinos in several different states.

17. 18 U.S.C. § 1304 (1984 & Supp. 1996).

18. Casinos are allowed to advertise their restaurants, hotel rooms and shows, but they are strictly prohibited from broadcasting advertisements which are in any way related to gaming activities, including a ban on the use of the word "casino." *See* Crigler et al., *supra* note 15, at 43–46.

19. *See* Valley Broadcasting Co. v. United States, 820 F. Supp. 519 (D. Nev. 1993); Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)). Both of these cases specifically address the constitutionality of 18 U.S.C. § 1304 when used to prohibit advertisements for private casinos.

20. *Valley Broadcasting*, 820 F. Supp. at 525.

It is difficult to see how the government can claim that suppressing speech concerning private casino gambling is justified by a federalism interest when so many other gambling establishments are allowed to freely advertise. The broad exceptions to § 1304 have led many commentators, and even government officials, to the logical conclusion that the antiquated prohibitions should no longer apply to legally authorized gaming, whether it be lotteries, poker, blackjack or other casino-style games.[21] Even the Department of Justice questions the constitutionality of the prohibitions on casino advertising.[22] Nevertheless, the FCC continues to penalize broadcasters who air casino advertisements under 47 C.F.R. § 73.1211, the FCC's corresponding regulation to 18 U.S.C. §§ 1304 and 1307.

This Note considers the application of § 1304 to private casino gaming advertisements. Section II briefly sets forth the standard of review used in commercial speech cases today. Section III first traces the development of lotteries and lottery prohibitions throughout the history of the United States, and then addresses why privately held casino activities should not fall within the scope of 18 U.S.C. § 1304.

Section IV of this Note analyzes two modern Supreme Court cases that address advertisements of casino activities and lotteries: *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*[23] and *United States v. Edge Broadcasting Co.*[24] Section V analyzes the recent district court decisions of *Valley Broadcasting Co. v. United States*[25] and the Fifth Circuit's decision in

---

21. *See* Brief for Appellees at 41, *Valley Broadcasting*, 820 F. Supp. 519 (D. Nev. 1993), *appeal docketed*, No. 93-16191 (9th Cir. Oct. 4, 1993), quoting letter from Bruce E. Fein, General Counsel for FCC, to the Criminal Law Subcommittee of the Senate Judiciary Committee on Modernizing Federal Restrictions on Gaming Advertising, 98th Cong., 2d Sess. 6–7 (1984):

> Because of our experience with the lottery statutes, we believe that the exception proposed in S. 1876 [to allow advertising of all authorized licensed and regulated lotteries] would be helpful and indeed that it might well be expanded to permit advertising on radio and television of lotteries that are legal in the state in which they are conducted, even though not regulated by that state.... Handling these inquiries [as to the acceptability of advertising] utilizes a significant amount of staff time.... The amount of time expended seems inordinate to the 'evil' involved.
>
> It is our view that permitting the advertising of lotteries legal in the states in which they are conducted would not unleash fraudulent schemes on the public. Rather, it would fill the fund-raising and marketing needs of entities that deem games involving price, chance and consideration to be effective tools for legitimate purposes. It will also permit Commission staff to address more significant matters.

It is possible that Fein was only addressing lotteries as that term is defined in U.S.C. § 1307(d) (1984 & Supp. 1996), "the pooling of proceeds derived from the sale of tickets" or lotteries as a person of common intelligence would define them, and was not including casino gambling. However, if this is the case, the prohibitions should not apply to anything but the commonsense definition of lotteries in the first place.

22. I. NELSON ROSE, GAMBLING AND THE LAW 56, 250 (1986) (citing *A Bill to Allow Advertising of any State-Sponsored Lottery, Gift Enterprise, or Similar Scheme: Hearing on S. 1876 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 31 (1983)) (statement of John C. Kenney, Deputy Assistant General); *Hearing on H.R. 4020 and H.R. 5097 before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 98th Cong., 1st Sess. (1983) (statement of John C. Kenney).

23. 478 U.S. 328 (1986).

24. 113 S. Ct. 2696 (1993).

25. 820 F. Supp. 519 (D. Nev. 1993).

*Greater New Orleans Broadcasting Ass'n v. United States*.[26] In both of these cases the plaintiffs wished to broadcast commercials concerning legal gaming activities, but were prohibited from doing so because of the FCC's enforcement of 18 U.S.C. § 1304 under 47 C.F.R. § 73.1211. The plaintiffs therefore sought declaratory judgment in their respective federal district courts, asking the courts to find that: (1) casino gaming is not a "lottery, gift enterprise, or similar scheme"[27] within the meaning of 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211; or (2) if casino gaming does fall within the meaning of § 1304 and § 73.1211, that those statutes violate their freedom of speech rights under the First Amendment to the U.S. Constitution.[28]

Section VI concludes the Note with proposed solutions to remedy the irrational application of 18 U.S.C. § 1304 to casino advertising.

## II. COMMERCIAL SPEECH DOCTRINE

The First Amendment to the United States Constitution employs unqualified language: "Congress shall make no law...abridging the freedom of speech."[29]

Despite this unambiguous language, certain forms of speech are afforded only limited protections under the First Amendment. Commercial speech[30] which concerns a lawful activity and is not misleading[31] is included in this group of speech that receives a limited form of protection.

The constitutionality of restrictions on commercial speech are analyzed under a four-step test formulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[32] The *Central Hudson* test asks: (1) whether the commercial speech concerns a lawful activity and is not misleading; (2) whether the asserted government interest promoted by the restrictions on the speech is substantial; (3) whether the regulation directly advances the asserted government interest;[33] and (4) whether the restriction is no more extensive than is necessary to serve the substantial government interest.[34]

---

26. 69 F.3d 1296 (5th Cir. 1995).

27. 18 U.S.C. §§ 1301–1304 (1984 & Supp. 1996).

28. *See Valley Broadcasting*, 820 F. Supp. at 522–23; *Greater New Orleans Broadcasting*, 69 F.3d at 977.

29. U.S. CONST. amend. I.

30. Commercial speech can be defined as expressions related solely to the economic interests of the speaker and which does "'no more than propose a commercial transaction.'" Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 385 (1973)).

31. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

32. 447 U.S. 557 (1980).

33. The third prong of the *Central Hudson* test has been modified by *Edenfield v. Fane*, 507 U.S. 761 (1993). There the Court stated that the government carries the burden of showing that the challenged regulation advances the government's interest "in a direct and material way." *Id.* at 762. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770–71.

34. *Central Hudson*, 447 U.S. at 566. The Supreme Court has since diminished the effectiveness of the test in protecting commercial speech by reading step four to require only a "reasonable fit" between the restriction on speech and the asserted government interest instead of requiring the government to use available less restrictive alternatives as is suggested in the plain language of *Central Hudson*. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

## III. HISTORY OF LOTTERIES AND PROHIBITORY LOTTERY ADVERTISEMENT STATUTES

Gambling fever has swept the nation for the third time in its history.[35]

The first wave of legalized gambling in the United States started by 1612, when the British Crown authorized the Virginia Company of London to conduct lotteries to support the Jamestown Settlement.[36] In order to advertise the lottery, the Virginia Company distributed handbills and had a twenty-six stanza ballad composed to promote it.[37]

In 1777, the United States Lottery, which also had an accompanying patriotic advertisement,[38] was created by Congress to raise money to fund the American Revolutionary War with Britain.[39] In 1812, Congress authorized the District of Columbia to conduct lotteries,[40] and by 1832, eight eastern states were raising $ 66.4 million annually through lotteries,[41] the proceeds of which helped finance the establishments of cities and universities.[42] In fact, even such distinguished men as George Washington, Thomas Jefferson, and Benjamin Franklin sponsored private lotteries.[43] The end to the first wave of legalized gambling was marked by the beginning of the Civil War when only Missouri and Kentucky still maintained legal lotteries.[44]

The second wave of legalized gambling in the United States followed the Civil War, as the devastated South looked to lotteries as a quick way to raise much needed funds.[45] This wave, however, was distinguished by one of the largest "scandals" in American history—the Louisiana Lottery. The Louisiana Lottery was described as the "Serpent" and "Hydra-headed monster"[46] "which spread its tentacles to every corner of the nation"[47] because of the nationwide monopoly the lottery enjoyed and because of the social problems it was deemed to have created. In an attempt to control such lotteries, Congress passed the

---

35. The "three waves of gambling" terminology is borrowed from ROSE, *supra* note 22, at 1.

36. *See* G. SULLIVAN, By CHANCE A WINNER, 5–25 (1972). *See also* Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 & n.77 (1992).

37. SULLIVAN, *supra* note 36, at 12–13.

38. The advertisement read:

> It is not doubted but every real friend of his country will most cheerfully become an adventurer, and that the sale of tickets will be very rapid, especially as even the unsuccessful adventurer will have the pleasing reflection of having contributed a degree to the great and glorious American cause.

*Id.*

39. JOHN M. FINDLAY, PEOPLE OF CHANCE 33 (1986).

40. Act of May 4, 1812, ch. 75, § 6, 2 Stat. 721 (1812). *See* G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 927–28 n.12 (1978).

41. Brief for Appellees, *Valley Broadcasting*, *supra* note 21, at 4 (citing NATIONAL INST. ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776 TO 1976, at 655–70 (1977)).

42. Rychlak, *supra* note 36, at 12.

43. ROSE, *supra* note 22, at 1.

44. John S. Gordon, *Born of Iniquity, Running the Long Lived Louisiana Lottery Was as Certain a Moneymaker as Owning the Mint*, AM. HERITAGE MAG., Feb.-Mar. 1994, at 14.

45. ROSE, *supra* note 22, at 1.

46. Blakey, *supra* note 40, at 937–39.

47. SULLIVAN, *supra* note 36, at 9.

predecessor to 18 U.S.C. § 1303,[48] which prohibited a Postmaster or Assistant Postmaster from acting as an agent for lottery offices or from vending lottery tickets.[49] Further actions, however, were soon found to be needed to control the lotteries, so in 1868 Congress enacted the predecessor to 18 U.S.C. § 1302,[50] which prohibited depositing any materials concerning lotteries or similar schemes into the mail.[51] Four years later, Congress codified the postal laws[52] but only subjected illegal lotteries to the prohibitions.[53] However, the Louisiana Lottery continued to grow so large[54] and incited so much illegal activity[55] that Congress felt it again necessary to prohibit legal lotteries from mailing lottery materials.[56] This attempt to eliminate the Louisiana Lottery, the only remaining authorized lottery in existence at the time,[57] failed.[58] Finally, under pressure

---

48. 18 U.S.C. § 1303 (1984) & Supp. 1996) provides:
Whoever, being an officer or employee of the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined under this title or imprisoned not more than one year, or both.

49. Act of Mar. 2, 1827, ch. 61, 4 Stat. 238, 239 (1827).

50. 18 U.S.C. § 1302 (1984 & Supp. 1996) provides:
Whoever knowingly deposits in the mail, or sends or delivers by mail:
Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;
Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
Any article described in section 1953 of this title -
Shall be fined under this title or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

51. Act of July 27, 1868, ch. 246, 15 Stat. 194 (1868).

52. 18 U.S.C. §§ 1301–1303 (1984 & Supp. 1996).

53. Act of June 8, 1872, ch. 335, § 79, 17 Stat. 294 (1872).

54. By the late 1800s the Louisiana State Lottery's annual income was $ 13 million. Rychlak, *supra* note 36, at 40–41.

55. Ninety-three percent of the Louisiana Lottery income came from illegal participation in the Lottery by citizens outside of Louisiana, which violated the existing prohibition on sending lottery materials through the mails. 21 CONG. REC. 8705–06 (1890) (remarks of Rep. Moore).

56. The ban on mailing lottery information was upheld in *Ex parte* Jackson, 96 U.S. 727 (1877).

57. Rychlak, *supra* note 36, at 40.

58. The Louisiana Lottery advertised in newspapers as newspapers were outside the ban's reach according to U.S. Attorney General Augustus H. Garland. *See* 18 Op. Att'y Gen. 306, 309 (1885).

from President Harrison to abolish the Louisiana Lottery, Congress passed the Anti-lottery Act of 1890 which banned the mailing of newspapers containing lottery information.[59]

Unable to mail lottery information and tickets, and after losing its state charter, the privately-operated Louisiana lottery moved its operation to Honduras and used messengers instead of the mail to disseminate the lottery information in the United States.[60] Once again, Congress enacted a law intentionally attempting to abolish the Louisiana Lottery operation which had now "become offensive to the entire people of the nation."[61] This time, Congress relied on its Commerce Clause powers[62] and banned the transportation of all lottery materials from interstate and foreign commerce,[63] to prohibit messengers from transporting lottery information into and within the United States.[64] This statute marked the death of the Louisiana Lottery and the second wave of legalized gambling in the United States.

With the invention of the radio, Congress felt it was only fair that this new medium be subject to the same prohibitions regarding lottery advertisements as the existing media were.[65] Thus, Congress enacted the Communications Act of 1934[66] which prohibited the broadcast[67] of lottery information over the airwaves.[68] The broadcast prohibition served two purposes: (1) to promote consistency with the postal prohibitions;[69] and, (2) to subject broadcasters to the same prohibitions as those in print media so that broadcasters did not enjoy an unfair advertising advantage over newspapers.

The third and current wave of legalized gambling began with the implementation of state-run lotteries which were again sought as a way to supplement decreasing state incomes without forcing their citizens to bear additional income tax increases. In 1963, New Hampshire became the first state to operate a legal state lottery in this century[70] with New York and New Jersey close behind. By 1975, ten other states were operating their own lotteries.

Congress was now faced with at least two options regarding the prohibitions on lottery advertisements: (1) repeal the existing lottery advertisement prohibitions to allow states to promote this easy form of revenue

---

59. Anti-lottery Act of 1890, ch. 908, § 3894, 26 Stat. 465 (1890). The Anti-lottery Act was upheld in *Ex parte* Rapier, 143 U.S. 110 (1892).

60. Blakey & Kurland, *supra* note 40, at 941.

61. Champion v. Ames, 188 U.S. 321, 358 (1903).

62. Congress' commerce power is contained in Article I, Section 8, Clause 3 of the Constitution and has been described as affecting "every species of commercial intercourse...which concerns more states than one...." Gibbons v. Ogden, 22 U.S. 1 (1824).

63. Act of Mar. 2, 1895, ch. 191, § 1, 28 Stat. 963 (1895).

64. The Supreme Court upheld this statute as being a valid exercise of Congress' Commerce Clause powers in France v. United States, 164 U.S. 676 (1897), and Champion v. Ames, 188 U.S. 321 (1903).

65. *See* H.R. REP. NO. 221, 72d Cong., 1st Sess. 8 (1932); S. REP. NO. 1045, 72d Cong., 2d Sess. 11 (1933).

66. Communications Act of 1934, ch. 652, § 316, 48 Stat. 1064, 1088 (1934).

67. The ban applies only to broadcasts, which has been interpreted by the FCC to exclude advertisements on cable television. *See* 47 C.F.R. § 76.213.

68. The modern broadcast prohibition is contained in 18 U.S.C. § 1304. For the full text of § 1304, see *supra* note 1 .

69. 18 U.S.C. §§ 1301–1303.

70. Blakey & Kurland, *supra* note 40, at 950; N.H. REV. STAT. ANN. § 284:21–a to 21–r (1977).

raising, or (2) do nothing and risk the possible, although unlikely, prosecution of state actors responsible for permitting the advertisement of such lotteries. Congress, however, chose a third option. Instead of repealing the antiquated laws,[71] it created 18 U.S.C. § 1307, which exempted state lotteries from the bans contained in 18 U.S.C. §§ 1301 to 1304.[72] Thus, the statutes that were originally drafted to eliminate state lotteries were rendered no longer applicable to state lotteries. With the major stumbling block to advertising lotteries lifted by 18 U.S.C. § 1307, the tidal wave of state run lotteries began to swell. By the end of 1994 thirty-seven states had lotteries[73] and it is predicted that all states, except Utah,[74] may have a lottery by the end of this decade.[75]

### *A. 18 U.S.C. Should Not Apply to Casino Advertising*

The Supreme Court has stated that there are three elements of a "lottery, gift enterprise, or similar scheme":[76] "(1) the distribution of prizes; (2) according to chance; (3) for a consideration."[77] However, just because casino games contain these three elements does not mean that such games constitute a lottery.

> Both lotteries and other forms of gambling [such as poker] unquestionably inhere the elements of chance consideration, and prize; however, this premise alone does not lead to the conclusion that both are one and the same. Indeed, the game of poker inheres the elements of chance, consideration and prize. Does this mean that poker is a lottery? The FCC contends that any game which inheres the three elements is a lottery; therefore the FCC presumably would conclude that poker is a lottery. Indeed, under this broad definition the stock market, life insurance, and other business enterprises involving the three elements could be deemed a lottery. Such logic seems no less absurd than that

---

71. 18 U.S.C. §§ 1301–1304.

72. First, Congress authorized state lotteries to broadcast advertisements within the state conducting the lottery. 18 U.S.C. § 1307(a)(2) (1975). Next, Congress authorized states to advertise their lotteries in any adjacent state which had its own state lottery. 18 U.S.C. § 1307(a)(2) (1976). Finally, Congress authorized all state lotteries to advertise in any state which also had a legalized state lottery. 18 U.S.C. § 1307(a)(1) (1988). 18 U.S.C. § 1307(a)(1) now provides in relevant part:

> The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to-
>
> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is-
>
> (A) contained in a publication published in that State or in a State which conducts such a lottery; or
>
> (B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery....

73. Laura J. Schiller, *The Lottery in* United States v. Edge Broadcasting Co.: *Vice or Victim of the Commercial Speech Doctrine?* 2 VILL. SPORTS & ENT. L. F. 127, 138 (1995) (citing Pamela Greenberg, State Lottery Count (Nov. 15, 1994) (unpublished data, calculations on file with NAT'L CONF. OF STATE LEGISLATORS)).

74. Utah's Constitution prohibits the establishment of lotteries. UTAH CONST. art. VI, § 27. *See also* Salt Lake City v. Doran, 131 P. 636 (1913).

75. Rychlak, *supra* note 36, at 45–46.

76. 18 U.S.C. §§ 1301–1304.

77. FCC v. American Broadcasting Co., 347 U.S. 284, 290 (1954). *American Broadcasting* did not address whether casino-type gaming constitutes a lottery. Instead, the Court dealt with whether radio station give-away schemes, which gave prizes to listeners who could correctly answer a question, constituted a lottery, and whether listening to a radio program provided adequate consideration. *Id.* The Court held that the FCC had exceeded its power by "stretching the statute [§ 1304] to the breaking point to give it an interpretation that would make such programs a crime." *Id.* at 294.

> which equates a horse, dog, and cat with one another simply because each has four legs, two eyes, and one tail.[78]

Thus, without critically examining the three elements of a lottery, it would be easy to conclude that casino activities fall within the reach of the anti-lottery statutes.[79] However, a critical analysis of the three elements is absolutely necessary. Indeed, most previous cases dealing with the lottery statutes have turned on "whether the scheme, *on its own peculiar facts*, constituted a lottery."[80] All forms of gambling are not lotteries simply because all lotteries are forms of gambling.[81] Such a construction ignores common sense and has been rejected by several courts.[82]

Moreover, the Supreme Court in *Stone v. Mississippi*[83] recognized that there is a difference between traditional lotteries,[84] gift enterprises,[85] and common forms of casino gambling. "[E]xperience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community."[86] As one commentator has pointed out, "*Stone* is particularly important because it was decided during the years of debate in Congress on the anti-lottery bills. Congress knew, when it passed the anti-lottery statutes, that the Supreme Court has construed the word lottery to exclude common forms of gambling."[87] Moreover, in *American Broadcasting*,[88] the Supreme Court relied on *Stone* to identify the three elements that are essential to the composition of a lottery.

"'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests"[89] because the FCC has determined that these

78. Knight v. State *ex rel.* Moore, 574 So. 2d. 662. 668 (Miss. 1990).
79. 18 U.S.C. §§ 1301–1304.
80. *American Broadcasting*, 347 U.S. at 293 (emphasis added).
81. "A lottery is a species of gambling. The term 'gambling' is broader and encompasses more than the term 'lottery.'" State *ex rel.* Gabalac v. New Universal Congregation of Living Souls, 379 N.E.2d 242, 244 (Ohio App. 1977).
82. *Id. See also* Ginsberg v. Centennial Turf Club, 251 P.2d 926 (Colo. 1952).

> In Colorado a "lottery"...cannot be authorized by law. However, there is no prohibition in our Constitution which prevents the legislature, or the people, from authorizing certain forms of gambling. It unquestionably is true that all lotteries and gift enterprises are forms of gambling, but it does not follow that all gambling is a 'lottery' or 'gift enterprise,' as those terms are defined in law. No one [except the FCC] would contend that a game of poker, in which money is bet upon the relative value of the cards held by the participants, constitutes a lottery, but it most certainly is a form of gambling.

*Ginsberg*, 251 P.2d at 929.
83. 101 U.S. 814 (1880).
84. The Supreme Court has defined a typical lottery as a scheme in which tickets are sold and prizes are awarded among the ticketholders by lot. *American Broadcasting*, 347 U.S. 284, 291 n.8 (1954).
85. "A typical 'gift enterprise' differs from [a traditional lottery] in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a 'free' chance in a drawing." *Id.* (citing Horner v. United States, 147 U.S. 449 (1893)).
86. Stone v. Mississippi, 101 U.S. 814, 818 (1880) (citing Phalen v. Virginia, 49 U.S. 163, 168 (1850)).
87. ROSE, *supra* note 22, at 60.
88. *American Broadcasting*, 347 U.S. 284 (1954).
89. *Id.*

activities involve skill and not merely chance.[90] If betting on horse racing falls outside the prohibitions on advertising lotteries, because it involves skill, then gambling games such as poker should also be exempt from the prohibitions on advertising lotteries because of the skill required to win the game. Poker surely requires as much skill to win as picking a certain horse does. Judicial notice has been taken regarding this point.[91]

It is also important to note that the anti-lottery laws[92] Congress passed in the late 1800s and early 1900s were intended to apply to traditional lotteries,[93] specifically the Louisiana Lottery,[94] and not casino gambling establishments. There are several historical facts that point to this conclusion even if the clear relationship between the anti-lottery laws and the Louisiana Lottery is not apparent.

First, if Congress had intended to prohibit broadcasts of information on casino-type games it would have used specific words to do so.[95] When Congress established prohibitions against casino-type games, it did not choose to use the words "lottery, gift enterprise, or similar scheme."[96] Instead it utilized more

---

90. For example, the FCC does not consider betting on horse racing as falling within the definition of a lottery because it involves skill instead of mere chance. ROSE, *supra* note 22, at 63.

91.

> If any substantial degree of skill or judgment is involved, it is not a lottery. Of course, all forms of gambling involved prize, chance, and consideration, but not all forms of gaming are lotteries. A lottery is a scheme or plan, as distinguished from a game where some substantial element of skill or judgment is involved. Poker, when played for money, is a gambling game, but, since it involves a substantial amount of skill and judgment, it cannot reasonably be contended that it is a lottery.

State v. Coats, 74 P.2d 1102, 1106 (Or. 1938).

"Gambling schemes where winning depends on skill or judgment are not like a lottery in which success is determined by pure chance and is thus specially attractive to the inexperienced and the ignorant." Boasberg v. United States, 60 F.2d 185, 186 (5th Cir. 1932).

> The State argues that poker is not a game of skill but is a game of pure chance or luck. This allegation is a canard. Anyone familiar with even the barest rudiments of the game knows better. Pure luck? Send a neophyte player to a Saturday night poker game with seasoned players and he will leave his clothes behind and walk home in a barrel. Pure luck? This is true of bingo or lottery. But it cannot be said of poker.

People v. Mitchell, 444 N.E.2d 1153, 1157 (Ill. App. Ct. 1983) (Heiple, J., dissenting).

92. 18 U.S.C. §§ 1301–1304.

93. *See supra* note 2.

94. *See supra* notes 46–64 and accompanying text.

95. *See* ROSE, *supra* note 22, at 59.

96. 18 U.S.C. §§ 1301–1304.

appropriate words such as "gambling establishment,"[97] "gambling game,"[98] "gambling devices,"[99] and "bets or wagers."[100]

Second, it would be absurd to argue that Congress did not know that other forms of gambling besides lotteries existed at the time the statutes were passed. Just three years prior to the passing of the Communications Act of 1934, Nevada received national publicity when it legalized all forms of casino gambling.[101] Congress surely knew at this time that other forms of gambling were legalized throughout the West.[102] Yet the language Congress employed in the Communications Act of 1934[103] does not reflect a desire to apply the anti-lottery laws to casino gambling establishments.[104] Therefore, courts should not imply congressional intent to apply the anti-lottery laws to casinos when Congress specifically declined to do so themselves.

Moreover, it would seem to be an error for a court to assume that the words "lottery, gift enterprise, or similar scheme"[105] encompass other forms of gambling such as poker when Congress was aware of these other forms of gambling, yet declined to mention them in the prohibitory statutes.

These historical facts, coupled with the fact that 18 U.S.C. § 1304 is a criminal statute which must be strictly construed,[106] should lead to a conclusion that 18 U.S.C. §§ 1301–1304 do not apply to casino gaming, which is not a "lottery, gift enterprise, or similar scheme"[107] within the plain meaning of these terms.

## IV. Analysis of Modern Supreme Court Cases Concerning Advertisements of Gaming and Lotteries

---

97. 18 U.S.C. § 1082(a) provides in relevant part that it is unlawful:

> (1) to set up, operate, or own or hold any interest in any *gambling...establishment* on any *gambling ship*; or
>
> (2) in pursuance of the operation of any *gambling establishment* on any *gambling ship*, to deal any *gambling game*, or to conduct or operate any *gambling device*, or to induce, entice, solicit, or permit any person to bet or play at any such establishment....

(emphasis added).

98. *Id.*

99. *Id.*

100. 18 U.S.C. § 1084 (a). "Whoever being engaged in the business of *betting* or *wagering* knowingly uses a wire communication facility for the transmission...of *bets* or *wagers* or information assisting in the placing of *bets* or *wagers* on any sporting event or contest...or for information assisting in the placing of *bets* or *wagers*..." shall be fined or imprisoned. *Id.* (emphasis added).

101. ROSE, *supra* note 22, at 59.

102. Poker was legal in Arizona, California, Colorado, Nevada, New Mexico, Oregon, and Washington when Congress was passing the postal prohibitions on lotteries. ROSE, *supra* note 22, at 60.

103. 18 U.S.C. § 1304.

104. *See supra* note 1 for text of 18 U.S.C. § 1304 which nowhere uses the terms "gambling", "gaming", or "casino".

105. As denoted in 18 U.S.C. §§ 1301–1304.

106. *American Broadcasting*, 347 U.S. 284, 296 (1953).

107. As denoted in 18 U.S.C. §§ 1301–1304.

The Supreme Court has recently ruled on two cases dealing with the advertisements of gaming and lotteries: *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*[108] and *United States v. Edge Broadcasting Co.*[109] Although some reasoning may be taken from each of these cases, neither of them, as will later be explained, should be controlling in the *Valley Broadcasting* litigation,[110] or the *Greater New Orleans Broadcasting Ass'n* litigation.[111]

### *A.* Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico[112]

Posadas de Puerto Rico Associates (Posadas) is a partnership which operated a casino in Puerto Rico.[113] Posadas was fined three times for violating a Puerto Rico law that prohibited the word "casino" from appearing in any "'object which may be accessible to the public in Puerto Rico.'"[114] Posadas filed a declaratory judgment action, asking the Superior Court of Puerto Rico to find that Puerto Rico's Games of Chance Act of 1948,[115] which provided that "[n]o gambling room shall be permitted to advertise...their facilities to the public of Puerto Rico"[116] violated the First Amendment of the United States Constitution.[117]

The Superior Court of Puerto Rico narrowed the construction of the statute by ruling that the statute only prohibited advertisements that were directed towards Puerto Rico residents, but allowed casino advertisements addressed to tourists.[118] Under this standard, the court declared that Posadas' constitutional rights had been violated and it should not have been fined; however, the court found that the statute's restrictions themselves were not facially unconstitutional.[119]

The United States Supreme Court declared jurisdiction over the appeal[120] and applied a deferential four-part *Central Hudson* test, affirming the superior court's ruling.[121] First, the Court ruled that casino gambling advertisements

---

108. 478 U.S. 328 (1986).
109. 113 S. Ct. 2696 (1993).
110. *Valley Broadcasting*, 820 F. Supp. 519 (D. Nev. 1993) (on appeal to the Ninth Circuit Court of Appeals).
111. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).
112. 478 U.S. 328 (1986).
113. Posadas de Puerto Rico Associates is a partnership organized under Texas law and franchised to operate a gambling casino in Puerto Rico under the name of Condado Holiday Inn Hotel and Sands Casino. 478 U.S. at 330.
114. *Posadas*, 478 U.S. at 333 (quoting P.R. LAWS ANN. tit. 15, § 77 (1972)).
115. Act No. 221 of May 15, 1948, 1948 P.R. Laws 750.
116. P.R. LAWS ANN. tit. 15, § 77 (1972)
117. U.S. CONST. amend. I.
118. *Posadas*, 478 U.S. at 335. This was apparently the intent of the Puerto Rico legislature.
119. *Id.* at 336–37.
120. The Supreme Court held that it had jurisdiction to review the appeal under 28 U.S.C. § 1258(2) (1993), which authorizes jurisdiction for the Supreme Court when a statute of Puerto Rico is being challenged as being repugnant to the United States Constitution. *Posadas*, 478 U.S. at 337.
121. *Id.* at 344.

concerned a lawful activity under Puerto Rico law, and were not misleading.[122] Thus, under *Central Hudson*, the advertisements deserved some First Amendment protection.

Second, the Court deferred to the government's assertion that the Puerto Rico Legislature believed "'[e]xcessive casino gambling among local residents...would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens.'"[123]

Third, the Court ruled that the restrictions directly advanced the government's interest in reducing gambling by Puerto Rican citizens,[124] because it could be reasonably assumed that there was a connection between advertising and the demand for gambling.[125]

Finally, the Court analyzed whether there was a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends."[126] Under this final step, the Court held that the superior court's narrow construction of the statute satisfied the reasonable fit required by the final prong of *Central Hudson.*[127]

### *1. Analysis of the Court's Deferential Approach in* Posadas

The Court's approach in *Posadas* can accurately be described as exceptionally deferential to the government when compared to the approach the

---

122. *Id.* at 340–41.

123. *Id.* at 341. The court stated:

> The Tourism Company's brief before this Court explains the legislature's belief that '[e]xcessive 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.' Brief for Appellees 37.... We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest.

*Id.* (citation ommitted).

However, if the Court had not deferred to the governments' findings they would have found

> [n]either the statute on its face nor the legislative history indicates that the Puerto Rico legislature thought that serious harm would result if residents were allowed to engage in casino gambling; indeed, the available evidence suggests exactly the opposite. Puerto Rico has legalized gambling casinos, and permits its residents to patronize them.

*Id.* at 352–53 (Brennan, J., dissenting).

124. The Court again deferred to the Puerto Rican Legislature's beliefs, stating "[t]he Puerto Rico Legislature obviously believed...that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised.... [A]nd the fact that appellant has chosen to litigate this case...indicates that appellant shares the legislature's view." *Id.* at 341–42.

125. The third prong of the *Central Hudson* test is satisfied, according to a plurality opinion, where legislative judgment is "not manifestly unreasonable." *Id.* at 342 (citing Metromedia Inc. v. San Diego, 453 U.S. 490, 509 (1981) (White, J., plurality opinion)).

126. *Id.* at 341 (quoting Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)). *See supra* note 34.

127. "The narrowing construction of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico." *Posadas,* 478 U.S. at 343. "We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis...." *Id.*

Court has taken in other areas of commercial speech.[128] This deference can be seen when one analyzes the Court's application of the third prong of the *Central Hudson* test. Under this prong, the government has the burden of proving that the commercial speech restrictions directly advance the government's asserted interest.[129]

In *Posadas*, the Court deferred to the government's assertion without requiring the government to meet its burden of proof. Specifically, the Court never made the government prove that the allegations of increased crime, prostitution, the development of corruption, or the infiltration of organized crime were anything more than pure conjecture. Moroever, the Court never made the government prove that the commercial speech restrictions would alleviate these social ills if in fact they did exist.

Such speculations would fail under the modern analytical framework set forth in *Edenfield v. Fane*, where the Court stated that the government's "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[130]

The Court's deference to the government in *Posadas* can be succinctly summed up: "[i]n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[131] This greater-lesser statement however, is in complete contradiction to the Court's declaration in *Central Hudson* where it stated: "[i]n applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." [132]

The FCC has attempted to use the greater-lesser language in *Posadas* as a bright-line test for the validity of speech restrictions in lieu of the *Central Hudson* test. This is so even though the *Central Hudson* test was applied in *Posadas*, and even though the Supreme Court has rejected such a test in *Edge Broadcasting*[133] and *Rubin v. Coors Brewing Co.*[134]

---

128. *See* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 (1995) (holding that a prohibition against beer labels indicating alcohol content violated the First Amendment because it did not advance the government's interest in a direct and material way)..

129. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

130. 507 U.S. 761, 770-71 (1993).

131. *Posadas*, 478 U.S. at 345–46. The Court dismissed Appellant's argument that the advertising here should be protected as in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) and Bigelow v. Virginia, 421 U.S. 809 (1975) because the underlying conduct in *Carey* and *Bigelow* were constitutionally protected (use of contraceptives and rights to an abortion respectively), whereas gambling in a casino is not. However, as Justice Brennan pointed out in his dissent, "the 'constitutional doctrine' which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment." *Posadas*, 478 U.S. at 354 n.4.

132. *Central Hudson*, 447 U.S. 557, 562 (1980).

133. United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

> The Government argues first that gambling implicates no constitutionally protected right, but rather falls within a category of activities normally considered to be "vices," and that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement; it argues that we therefore need not proceed with a Central Hudson analysis. The Court of Appeals did not address

The Supreme Court has also recently questioned whether the application of the greater-lesser argument was ever accepted in *Posadas.*[135] "*Rubin* thus undermine[s] the often-alleged effect of *Posadas* as requiring greater deference to government regulation of commercial speech about alleged harmful activities or products, and require[s] application of the full *Central Hudson* burden of proof on government [sic] to justify such regulations."[136]

Moreover, four Justices have recently gone as far as declining to give force to *Posadas'* "erroneous" First Amendment analysis.[137] In *44 Liquormart, Inc. v. Rhode Island*[138] the State argued that its decision to prohibit advertisement of retail prices for alcoholic beverages should be afforded deference "because the State could, if it chose, ban the sale of alcoholic beverages outright."[139] In other words, the State argued that the greater power to ban the product includes the lesser power to prohibit speech concerning the product. However, the principal opinion by Justice Stevens rejected such an argument and decimated the questionable *Posadas* reasoning.

> The reasoning in Posadas does support the State's argument, but, on reflection, we are now persuaded that Posadas erroneously performed the First Amendment Analysis.
>
> ....
>
> Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent...we decline to give force to its highly deferential approach.
>
> We also cannot accept the State's second contention, which is premised entirely on the "greater-includes-the-lesser" reasoning endorsed toward the end of the majority's opinion in Posadas.

---

> this issue and neither do we, for the statutes are not unconstitutional under the standards of Central Hudson applied by the courts below.

*Id.* at 425.

134. Rubin v. Coors Brewing Co, 115 S. Ct. 1585, 1589 (1995).

> The Government argues that Central Hudson imposes too strict a standard for reviewing...[the alcohol content prohibition] and urges us to adopt instead a far more deferential approach to restrictions on commercial speech concerning alcohol. Relying on United States v. Edge Broadcasting Co., and Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, the Government suggests that legislatures have broader latitude to regulate speech that promotes socially harmful activities...than they have to regulate other types of speech.... Neither Edge Broadcasting nor Posadas compels us to craft an exception to the Central Hudson standard, for in both of those cases we applied the Central Hudson analysis.

*Id.* at 1589 n.2 (citations omitted).

135.

> To be sure, Posadas did state that the Puerto Rican government could ban promotional advertising of casino gambling because it could have prohibited gambling altogether. But the Court reached this argument only after it already had found that the state regulation survived the Central Hudson test. The Court raised the Government's point in response to an alternative claim that the Puerto Rico's regulation was inconsistent with Carey v. Population Servs. Int'l and Bigelow v. Virginia.

*Id.* (citations omitted).

136. P. Cameron DeVore & Robert D. Sack, *Advertising & Commercial Speech, in* COMMUNICATIONS LAW 1995, at 51, 447–48 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 64–3945, 1995).

137. 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996).

138. *Id.*

139. *Id.* at 1511.

....

> Further consideration persuades us that the "greater-includes-the-lesser" argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.[140]

Therefore, it is fairly clear that the greater-lesser language in *Posadas* is an aberration when viewed in light of other Supreme Court decisions.[141]

### *B.* United States v. Edge Broadcasting Co.[142]

Edge Broadcasting Co. (hereinafter Edge) owned and operated POWER 94, an FM radio station licensed by the FCC to Elizabeth City, North Carolina.[143] Despite being licensed in Elizabeth City, Edge broadcasted from Moyock, North Carolina, which is located three miles south of the Virginia and North Carolina border. Ninety-two percent of Edge's listeners were located in Virginia,[144] and ninety-five percent of Edge's advertising revenues were derived from Virginia sources.[145] Edge wished to advertise Virginia's state-run lottery,[146] as Virginia spends millions of dollars in such advertising.[147] However, because North Carolina did not have a state-sponsored lottery at the time,[148] 18 U.S.C. § 1304 prohibited Edge, a North Carolina licensed radio station, from broadcasting information about Virginia's lottery.[149] Edge therefore sought a declaratory judgment in federal court[150] asking the court to find that 18 U.S.C. §§ 1304 and 1307, as applied to it, violated the First Amendment[151] and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[152]

The district court applied the *Central Hudson* test and found that, as applied to Edge, the statutes failed the third prong of the test because they did not directly advance the government's interest. Specifically, the district court found that the statutes did not shield North Carolina residents from being "'inundated with Virginia's lottery advertisements.'"[153] As the statutes did not directly advance the government's interest, they were an unconstitutional

---

140. *Id.* at 1511–12. (Stevens, J., joined by Kennedy, Thomas, and Ginsburg, J.J.)
141. *See* United States v. Edge Broadcasting Co., 509 U.S. 418, 425 (1993); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 n.2 (1995).
142. 509 U.S. 418 (1993).
143. *Id.* at 423.
144. *Id.*
145. *Id.* at 424.
146. VA. CODE ANN. § 58.1–4001 (Michie 1987).
147. The Virginia Lottery spent $1,202,905 on its introductory advertising campaign, $4,354,199 on its first three instant games, an estimated $2,300,000 to introduce its on-line games, and an estimated $3,000,000 per year to sustain the games. Brief for the Respondent at 9–10, *Edge Broadcasting*, 509 U.S. 418 (1993) (No. 92–486).
148. N.C. GEN. STAT. §§ 14–289 and 14–291 (1986 & Supp. 1992).
149. For the full text of 18 U.S.C. § 1304, see *supra* note 1. 18 U.S.C. § 1307 allows stations located in states that authorize lotteries to advertise any lottery, but prohibits stations located in a state that does not allow lotteries from broadcasting any lottery advertisements. 18 U.S.C. § 1307(a)(1)(B) (1988).
150. Eastern District of Virginia.
151. U.S. CONST. amend. I.
152. U.S. CONST. amend. XIV; United States v. Edge Broadcasting Co., 509 U.S. 418, 424 (1993).
153. *Edge Broadcasting Co.*, 509 U.S. at 427 (1993) (quoting the Court of Appeals).

restriction on commercial speech.[154] The Court of Appeals for the Fourth Circuit affirmed the district court's decision.[155] The Supreme Court granted certiorari[156] because it believed the courts below applied questionable reasoning in finding §§ 1304 and 1307 unconstitutional.[157] The Supreme Court applied the four-prong *Central Hudson* test and found §§ 1304 and 1307 constitutional,[158] reversing the lower court's decisions.[159]

Applying the first prong of *Central Hudson*, the Court assumed that Edge would air nonmisleading advertisements about Virginia's legal lottery, and thus, they deserved some type of First Amendment protection.[160]

As to the second prong of *Central Hudson*, the Court held that "the Government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries."[161] It should be noted that the substantial governmental interest recognized by the Court was not a federalism interest in discouraging gambling. Instead, the "policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*."[162]

The third prong of *Central Hudson* asks whether the "regulation directly advances the governmental interest asserted."[163] The Court rejected the district court's and Fourth Circuit's application of this prong "as applied" to Edge only.[164] Instead, the Court stated the question as whether the "regulation's general application to...all other radio and television stations in North Carolina and countrywide"[165] directly advances the governmental interest of "balancing the interests of lottery and nonlottery States."[166] When applied in this manner, the Court ruled that the statutes satisfied the third prong of *Central Hudson* by directly advancing the substantial balancing interest of the government.[167]

Finally, the Court ruled the fourth prong of *Central Hudson*[168] was satisfied, even when analyzed as applied to Edge only,[169] because the statutes

---

154. *Id.*
155. Edge Broadcasting Co. v. United States, 5 F.3d 59, 62 (4th Cir. 1992).
156. 506 U.S. 1032 (1992).
157. *Edge Broadcasting Co.*, 509 U.S. at 425.
158. Because the Supreme Court found §§ 1304 and 1307 constitutional under the *Central Hudson* test, the court did not address the issue of whether "the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement." *Id.* at 425.
159. *Id.* at 436.
160. *Id.* at 426.
161. *Id.* at 425.
162. *Id.* at 428.
163. *Central Hudson*, 447 U.S. at 566.
164. *Edge Broadcasting*, 509 U.S. at 427. "It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *Id.*
165. *Id.*
166. *Id.* at 428
167. *Id.* "We have no doubt that the statutes directly advanced the governmental interest at stake in this case." *Id.*
168. As modified by Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). *See supra* note 34.
169. *Edge Broadcasting*, 509 U.S. at 429.

had a reasonable fit with the overall problem of balancing the policies of lottery and nonlottery States.[170]

## V. POTENTIAL CASES FOR THE SUPREME COURT TO USE TO DETERMINE THE CONSTITUTIONALITY OF §§ 1304–1307 AS APPLIED TO CASINO ADVERTISING

*Valley Broadcasting Co. v. United States*[171] and *Greater New Orleans Broadcasting Ass'n v. United States*[172] both present the questions of: (1) whether casino gaming is a "lottery, gift enterprise, or similar scheme"[173] within the scope of 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211; and (2) if so, whether these statutes violate the First Amendment. It is likely that these two cases will be consolidated and heard by the Supreme Court as there is a split in authority among the lower federal courts with regard to the First Amendment question.

### *A.* Valley Broadcasting Co. v. United States[174]

The plaintiffs in *Valley Broadcasting* are two television stations licensed by the FCC to operate KVBC[175] in Las Vegas, Nevada, and KRNV[176] in Reno, Nevada.[177] The two stations wished to broadcast commercials relating to gaming activities that are legal in the State of Nevada, but were deterred from doing so because of the FCC's enforcement of 18 U.S.C. § 1304[178] and 47 C.F.R. § 73.1211.[179] The plaintiffs sought injunctive relief and a declaratory judgment from the U.S. District Court in Nevada, asking the court to find that: (1) "casino gaming is not a 'lottery, gift enterprise, or similar scheme' within the meaning of § 1304 and § 73.1211"; and (2) "that § 1304 and § 73.1211 as applied to casino gambling violate the First Amendment's protection of commercial speech...."[180]

The district court rejected the plaintiffs' argument that casino-type games are not a "lottery, gift enterprise or similar scheme"[181] which fall within the boundaries of § 1304. The court disregarded the history and purpose of § 1304[182] and instead looked to the definition of a lottery accepted in *FCC v.*

---

170. *Id.*

171. 820 F. Supp. 519 (D. Nev. 1993), appeal docketed, No. 93-16191 (9th Cir. Oct. 4, 1993).

172. 69 F.3d 1296 (5th Cir. 1995).

173. 18 U.S.C. §§ 1301–1304 (1984 & Supp. 1996).

174. 820 F. Supp. 519 (D. Nev. 1993).

175. Owned and operated by Valley Broadcasting Company.

176. Owned and operated by Sierra Broadcasting Company.

177. *Valley Broadcasting*, 820 F. Supp. at 521.

178. See *supra* note 1 for the full text of § 1304.

179. *Valley Broadcasting*, 820 F. Supp. at 522. 47 C.F.R. § 73.1211 is the FCC's regulation which correlates with 18 U.S.C §§ 1304 and 1307 and which also imposes financial and other penalties for violations thereof.

180. *Valley Broadcasting*, 820 F. Supp. at 522–23. The plaintiffs also argued that the FCC's prohibition as applied to television and radio stations, but not other media forms, violated the Equal Protection Clause. The district court summarily dismissed this issue, stating that the Equal Protection Clause only requires the government to show a "'legitimate state interest' which is not 'wholly irrelevant to the achievement of the State's objective.'" *Id.* at 527. The district court held that the government had shown this. *Id.*

181. 18 U.S.C. §§ 1301–1304.

182. *See supra* notes 48–68 and accompanying text.

*American Broadcasting.*[183] The *American Broadcasting* Court recognized three elements essential to all lotteries: "(1) the distribution of prizes; (2) according to chance; (3) for a consideration."[184] Accepting this definition of a lottery, the district court summarily held that casino activities fall within the reach of § 1304.[185]

After dismissing the plaintiffs' first argument, the district court applied the *Central Hudson* four-prong test.[186] As to the first prong of *Central Hudson,* the defendants conceded that the proposed broadcasts concerned a "lawful activity within the State of Nevada and are not misleading."[187] Thus, the court had little difficulty determining that the speech in question was protected by the First Amendment.

With regard to the second prong of *Central Hudson,* the government asserted two interests for the ban on television and radio broadcasts of legal gaming activity advertisements: "(1) a federalism interest in protecting the policies of states which have not legalized casino gaming; and (2) retarding the growth of private gambling which has been associated with harmful social effects including the spread of organized crime."[188]

The court agreed that the government had a substantial interest in protecting individual state choice regarding gambling.[189] However, it should be noted that the government interest recognized by the court was not a federalism interest in protecting states which have not legalized casino gambling in denigration of the policies of states which have legalized casino gaming. The interest was in protecting state choice on gambling issues whether that choice is to prohibit or legalize gambling.[190]

The court rejected the government's second purported interest because the government pointed to no evidence of the asserted social ills associated with casino gaming that were not also present with other forms of legalized

183. 347 U.S. 284 (1954).

184. *Id.* at 290.

185. Valley Broadcasting Co. v. United States, 820 F. Supp. 518, 524 (D. Nev. 1993).

> Applying these elements to the casino activities which Plaintiffs desire to advertise in Nevada leads to the inescapable conclusion that such games fall within the reach of § 1304.... [T]he money bet in such games qualifies as consideration, the money received upon a successful wager constitutes a prize, and that winning these games is dependent largely on chance.

*Id.*

186. *Valley Broadcasting,* 820 F. Supp. at 524–25.

187. *Id.* at 525.

188. *Id.* at 525. It is worth noting that the government has stated its interests slightly differently on appeal to the Ninth Circuit as: "(1) an interest in assisting states that prohibit casino gaming and other forms of commercial lotteries, in denigration of the policies of states that allow such gaming; and (2) an interest in discouraging public participation in commercial lotteries." Brief for the Appellants, *Valley Broadcasting, supra* note 21, at 18–19. These interests correspond more closely with the language from *Edge Broadcasting* than did those originally asserted by the government.

189. *Valley Broadcasting,* 820 F. Supp. at 525–26 (citing Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986) and United States v. Edge Broadcasting Co., 506 U.S. 1032 (1992)).

190. *Valley Broadcasting,* 820 F. Supp. at 526. "[T]he primary federal interest relating to the social costs of gambling is limited to the [sic] protecting individual state choice on this issue." *Id. See also Edge Broadcasting,* 509 U.S at 427.

gambling, including state lotteries and Indian casinos, which are free to advertise.[191]

Although *Valley Broadcasting* was decided by the district court before the *Edenfield v. Fane*[192] decision, the district court correctly placed the burden of proof on the government as *Edenfield* demands: "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[193] That burden "is not satisfied by mere speculation and conjecture."[194] Here, the government failed to meet its burden of proof because it offered "no specific evidence to support their assertion[s]."[195] Moreover, the court held that the government failed to prove how the restrictions on commercial speech would in fact alleviate organized crime to a material degree.[196]

Under the third prong of *Central Hudson,* § 1304 must directly advance the government's proffered interest.[197] The *Valley Broadcasting* court recognized that "prohibitions which are speculative and only remotely advance the state interest involved simply cannot justify silencing promotional advertising."[198] Because the government interest accepted by the court was the protection of state choice on gambling issues, the court ruled that § 1304 "only remotely advances its federalism interest"[199] because the advertisements would reach an audience consisting "overwhelmingly of Nevada residents."[200] Therefore, the court found "it difficult to accept that commercials about legalized casino gambling located in Nevada pose any real danger to the public policies of California and Utah[201] regarding casino gambling."[202] Thus, as the

---

191. *Valley Broadcasting*, 820 F. Supp. at 525–26.

> This court...rejects Defendants' argument that the...social costs of legalized gambling warrants the ban on advertising of casino gaming.... Defendants offer no specific evidence to support their assertion that licensed modern day casinos, which are subjected to heavy regulation are...[more attractive] to elements of organized crime...than in other forms of gaming for which no advertising limitations are enforced by the FCC. Similarly, the social costs associated with legalized gambling...are common to all forms of legalized gambling including state lotteries, Indian casinos, horse racing, and charitable gambling.

*Id.*

192. 507 U.S. 761 (1993).

193. *Id.* at 770.

194. *Id.*

195. *Valley,* 820 F. Supp. at 525.

196. *Id.*

197. *Id.* at 526.

198. *Id.* (citing *Central Hudson,* 447 U.S. at 565 and *Edge Broadcasting Co.*, 732 F. Supp. at 639).

199. *Id.* at 527.

200. *Id.* at 526. The evidence showed that it was possible that up to 4% of all households receiving the KVBC signal were Utah citizens and up to 19% of all households receiving the KRNV signal were California residents. *Id.* at 521. This is the sole reason the FCC had a federalism interest in prohibiting stations licensed to Nevada from advertising casino advertisements.

201. The two states that the plaintiff's signal may reach.

202. *Valley Broadcasting,* 820 F. Supp. at 526. It is questionable whether California actually has a public policy against gambling. Not only does California operate one of the largest lotteries in the nation and allow Indian casinos, but it also authorizes "card clubs" which play some of the same card games that are played in traditional casinos. In 1993, Southern California card clubs alone took in $7.5 billion in wagers. 140 CONG. REC. S12969–02 (citing Tom Hayden, *We All Lose on This Roll of the Dice,* L.A. TIMES, Sept. 12, 1994, at B7). One of

government "cannot regulate speech that poses no danger to the asserted state interest"[203] the court ruled that § 1304 failed the third prong of *Central Hudson*, and therefore its restrictions violated the First Amendment.[204]

As to the fourth prong of *Central Hudson*, the court ruled that the government's application of § 1304 was more extensive than necessary because the FCC failed to reach the sensible accommodation of "limiting the broadcast of lottery advertisements to television or radio stations located within states which permit such activity"[205] as is required under 18 U.S.C. § 1307.[206] This failure, coupled with the finding that the casino advertising ban enforced by the FCC "provides 'only the most incremental support' for defendants' federalism interest,"[207] led the court to hold that the ban did not satisfy the reasonable fit requirement of *Central Hudson*.[208]

*1. Possible Criticism of the Court's Application of* Central Hudson

There are two possible criticisms of the district court's application of the *Central Hudson* test. However, neither of these possible faults should be fatal to the court's ultimate holding. First, it can be argued that the court erred in applying the third prong of *Central Hudson* on an "as applied" basis to the Nevada broadcasters.[209] *Edge Broadcasting*[210] made it clear that the third *Central Hudson* factor "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity."[211] Instead, the question of whether the regulation directly advances the asserted governmental interest must be applied to all radio and television stations nationwide.[212] This mistake, however, should not be fatal to the court's holding because the issue of whether the regulation directly advances the asserted governmental interest on an as applied manner to the plaintiff is still dealt with under the fourth prong of *Central Hudson*.[213]

Second, the court arguably applied a stricter standard than the "reasonable fit" requirement of the final prong of *Central Hudson*. However, even under the most liberal application of the requirement, the regulation should still fail. There is no reasonable fit between the federal interest in protecting state choices on gambling and the restrictions imposed by the FCC on broadcasters licensed in states which choose to legalize gambling. This is so

---

these card clubs is the Bicycle Club, which, since 1990, has been operated by the federal government after U.S. Marshals seized the club from suspected drug dealers. *60 Minutes: The Bicycle Club* (CBS television broadcast, Mar. 24, 1996) (transcript available on WESTLAW at 1996 WL 8064821).

203. *Valley Broadcasting*, 820 F. Supp. at 526 (citing *Central Hudson*, 447 U.S. at 565).

204. *Id.* at 527.

205. *Id.*

206. See *supra* note 72 for the full text of 18 U.S.C. § 1307(a)(1).

207. *Valley Broadcasting*, 820 F. Supp. at 527.

208. *Id.*

209. The court concluded "commercials about legalized casino gambling located in Nevada [do not] pose any real danger to the public policies of California and Utah regarding casino gambling." *Id.* at 526.

210. United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

211. *Id.* at 427.

212. *Id.*

213. *Id.* "This is not to say that the validity of the statute's application to Edge is an irrelevant inquiry, but that issue properly should be dealt with under the fourth factor of the Central Hudson test." *Id.*

even in light of the fact that broadcasting signals may extend over state borders. The Supreme Court has already recognized this:

> [Congress] did not forbid stations in a lottery State such as [Nevada] from carrying lottery ads if their signals reached into an adjoining State such as [Utah] where lotteries were illegal.... [Nevada] could advertise its lottery through radio and television stations licensed to [Nevada] locations, even if their signals reached deep into [Utah].[214]

### *B.* Greater New Orleans Broadcasting Ass'n v. United States[215]

Louisiana broadcasters wished to broadcast advertisements relating to legal casino gambling activities located in Louisiana and Mississippi but were discouraged from doing so by 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211.[216] Following the encouraging district court ruling in *Valley Broadcasting,*[217] the Greater New Orleans Broadcasting Association, Inc. (hereinafter "Broadcasters")[218] filed a declaratory action in the Eastern District of Louisiana[219] asking the court to find: (1) that a stay of enforcement of 18 U.S.C. § 1304 issued by the FCC in Nevada[220] violated the Equal Protection Clause;[221] (2) that 18 U.S.C. § 1304 did not apply to casino gaming;[222] and (3) if however, 18 U.S.C. § 1304 did apply to casino gaming, that among other things,[223] the law violated its freedom of speech rights under the First Amendment.[224] The district court entered summary judgment for the defendant holding that: (1) the stay of enforcement in Nevada did not violate the Louisiana broadcasters' equal protection rights;[225] (2) 18 U.S.C. § 1304 applied to casino gaming;[226] and (3) 18 U.S.C. § 1304 did not violate the Broadcasters'

---

214. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993). Nevada has been substituted for Virginia and Utah for North Carolina.

215. 69 F.3d 1296 (5th Cir. 1995).

216. *Id.* at 1298.

217. Valley Broadcasting v. United States, 820 F. Supp. 519 (D. Nev. 1993) (holding 18 U.S.C. § 1304 unconstitutional when used to prohibit advertisements of casino gambling activities originating in the state in which such gambling is legal).

218. Greater New Orleans Broadcasting Association (hereinafter "Broadcasters") is a non-profit corporation which represents Louisiana broadcasters in all matters affecting the broadcasting industry. 69 F.3d at 1298.

219. Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 866 F. Supp. 975, 977 (E.D. La. 1994).

220. *See Valley Broadcasting*, 820 F. Supp. 519 (D. Nev. 1993) The FCC issued a stay of enforcement for Nevada broadcasters pending appellate review of *Valley Broadcasting* in the United States Court of Appeals for the Ninth Circuit. *Greater New Orleans Broadcasting*, 866 F. Supp. at 977.

221. U.S. CONST. amend. XIV, § 1. The Louisiana broadcasters argued that the stay of enforcement in Nevada classified the Nevada broadcasters differently than broadcasters outside Nevada, and thus, violated Louisiana broadcasters' equal protection rights. 866 F. Supp at 977.

222. 866 F. Supp. at 977.

223. The plaintiffs also argued that 18 U.S.C. § 1304 violated their freedom to contract, equal protection and due process rights.

224. 866 F. Supp. at 977 (referring to U.S. CONST. amend. I).

225. *Id.* at 978. The court relied on *Dunagin v. City of Oxford, Mississippi*, and stated that "[t]he minimal scrutiny recognized by the Fifth Circuit in commercial speech equal protection cases requires that 'the classification challenged need only be rationally related to a legitimate [governmental] interest.'" *Id.* (quoting Dunagin v. City of Oxford, 718 F.2d 738, 753 (5th Cir. 1983)). The court then found that the FCC stay of enforcement "easily meets constitutional muster" under this standard and also survives under the stricter standard "applicable to speech entitled to full First Amendment protection." *Id.*

226. Id. at 979.

First Amendment rights.[227] The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling.[228]

The Fifth Circuit Court applied the *Central Hudson* test to the advertising prohibitions, implicitly recognizing that the test is controlling in commercial speech areas whether or not the underlying activity is considered a "vice."[229]

The government conceded that the first prong of the *Central Hudson* test was satisfied as the advertisements the Broadcasters wished to air concerned a lawful activity that was not misleading.[230]

The second prong of the *Central Hudson* test, requiring the government to show it had a substantial interest in its regulations, proved to be the critical step in upholding the statute's constitutionality. The government asserted two interests that both the district court and the Fifth Circuit found substantial: (1) the interest in "assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate";[231] and (2) "discouraging public participation in commercial gambling,[232] thereby minimizing the wide variety of social·ills that have historically been associated with such activities."[233] Instead of analyzing the two asserted governmental interests as stated, the court refocused the issue in terms of whether the federal government had a substantial interest in protecting the health, safety, and welfare of its citizens by discouraging participation in casino gambling.[234] Under this characterization, the court assumed that there is a substantial federal interest in protecting the health, safety and welfare of its citizens.[235] Therefore, the second prong of *Central Hudson* was presumably met.

Under the third step of *Central Hudson,* the Fifth Circuit ruled that "section 1304 easily satisfies the third prong of the *Central Hudson* test"[236] because "a prohibition of advertising casino gambling directly advances the governmental interest in discouraging such gambling."[237] This logical connection between advertising and demand was also recognized in *Central Hudson,*[238] *Posadas,*[239] and *Edge Broadcasting.*[240]

---

227. *Id.* at 981.

228. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296 (5th Cir. 1995), *vacated,* 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).

229. 69 F.3d at 1299. *See supra* notes 133–40 and accompanying text; 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1513 (1996) (plurality rejecting any "vice" exception to the First Amendment).

230. 69 F.3d at 1299.

231. *Id.*

232. It is questionable whether the government has such an interest since at least 21 states authorize some type of casino gambling. *Id.* at 1303 n.6 (Politz, C.J., dissenting).

233. *Id.* at 1299.

234. *Id.* at 1299–1300.

235. *Id.* at 1300.

236. *Id.* at 1302.

237. *Id.* at 1301.

238. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 567–78 (1980).

239. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986).

240. United States v. Edge Broadcasting, 509 U.S. 418, 434 (1993).

As to the final prong of *Central Hudson*, the Fifth Circuit held that § 1304, like the Puerto Rican statute at issue in *Posadas*,[241] is narrowly tailored to achieve a substantial governmental interest.[242]

*1. Critique of the Fifth Circuit's Decision*

The Fifth Circuit's decision has been vacated and remanded[243] for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*.[244] Although the Court did not specify why the case was vacated, it is likely that the following criticisms were part of the reason.

a. Criticism of the Court's Reasoning for Applying 18 U.S.C. § 1304 to Casino Gaming

As in *Valley Broadcasting*,[245] the Louisiana Broadcasters argued that 18 U.S.C. § 1304 should not apply to casino gambling. However, this argument was rejected by the Fifth Circuit, as the court held that, despite the historical background of § 1304, the argument was foreclosed by *FCC v. American Broadcasting*.[246] There is a strong argument to be made however, that *American Broadcasting* is not as controlling as the Fifth Circuit read it to be.

First, *American Broadcasting* addressed radio station give-away schemes, not whether casino gambling fell within the scope of 18 U.S.C. § 1304.[247] Second, such radio station give-away schemes surely contain the three essential elements of a lottery—prize, chance and consideration[248]—just as casino gambling does. However, the Supreme Court ruled in *American Broadcasting* that the FCC had exceeded its given power by "stretching the statute to the breaking point to give it an interpretation that would make such programs a crime."[249] In so doing, the Supreme Court has made the commonsense determination that not all schemes involving prize, chance, and consideration are lotteries.[250] The Fifth Circuit, however, did not recognize this crucial determination. Instead, the Fifth Circuit engaged in a judicial

241. *See supra* note 115.

242. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1302 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).

243. 117 S.Ct. 39 (1996).

244. 116 S.Ct. 1495 (1996) (holding Rhode Island's statutory prohibition against advertising retail prices of alcoholic beverages violates the First Amendment).

245. 820 F. Supp. 519 (D. Nev. 1993).

246. 347 U.S. 284 (1954).

> [T]he Broadcasters choose to attack the historical underpinnings of the statute in an attempt to demonstrate that the statute was never intended to apply to casino gambling. Apparently, the Broadcasters are laboring under the misperception that this court is free to reject statutory interpretations handed down by the Supreme Court [in *FCC v. American Broadcasting*]. This we cannot do.

Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1298 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).

247. *See supra* note 77.

248. In *American Broadcasting*, the consideration was the fact that people listened to the radio station, the chance was a possibility of being chosen to answer a question, and a prize was given for a correct answer to the question. 347 U.S. at 286.

249. *Id.* at 294.

250. *See supra* notes 77–88 and accompanying text.

generalization that would presumably classify the stock market and life insurance as lotteries because they too involve prize, chance, and consideration.[251]

b. Criticism of the Court's Application of the *Central Hudson* Test

The second prong of the *Central Hudson* test requires the government to show it has a substantial interest in its regulations. The government asserted two interests: (1) the interest in "assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate";[252] and (2) "discouraging public participation in commercial gambling,[253] thereby minimizing the wide variety of social ills that have historically been associated with such activities."[254] Instead of analyzing the two asserted interests as stated by the government, the court asked whether the federal government had a substantial interest in protecting the health, safety, and welfare of its citizens by discouraging participation in casino gambling.[255] However, the court never articulated what the health, safety and welfare aspects were. Moreover, the court never required the government to prove what the health, safety and welfare components were. Instead, the court placed the burden of proof on the plaintiff broadcasters and then rejected their arguments. Regardless of the Fifth Circuit's application of the *Central Hudson* test in this case, it seems otherwise clear that the government bears the burden of proving "that the harms it recites are real."[256]

It is difficult to imagine what health, safety and welfare aspects would be protected by a prohibition on broadcasts concerning private casino gambling activities when Indian casinos and state-run lotteries advertise similar activities over the very same airwaves. Even if the federal government could prove that prohibiting commercials about legal gambling activities protects the health, safety, and welfare of federal citizens, such concerns are left to the states and not the federal government.[257]

> [I]t is the State to which the Constitution reserves the power to protect the health, safety and morals of the community. Therefore, so long as First Amendment considerations are observed, it is the State, rather than the national government, that should decide the extent to which the advertising of lotteries should be permitted.[258]

251. *See supra* note 78 and accompanying text.
252. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1299 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).
253. It is questionable whether the government has such an interest since at least 21 states authorize some type of casino gambling. *Greater New Orleans Broadcasting Ass'n*, 69 F.3d 1296, 1303 n.6 (5th Cir. 1995) (Politz, C.J., dissenting).
254. *Id.* at 1299.
255. *Id.* at 1299–1300.
256. Edenfield v. Fane, 507 U.S. 761, 771 (1993).
257. *See generally* THE FEDERALIST PAPERS (J. Cooke ed., 1961).
258. Brief for Appellees, *Valley Broadcasting*, *supra* note 21, at 29 (citing Douglas W. Kmiec, Deputy Assistant Attorney General, Office of General Counsel, Department of Justice, H.R. REP. NO. 557, 100th Cong., 2d Sess. 12–13 (1988)).

Moroever, "[t]he First Amendment directs...[courts] to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[259]

In determining that the two asserted federal governmental interests were substantial, the Fifth Circuit court relied heavily on *Posadas*,[260] stating that "*Posadas* involved virtually identical facts."[261] *Posadas* however, dealt with purely local regulations and local governmental interests.[262] 18 U.S.C. § 1304 was in no way implicated in *Posadas.* Moreover, no federal government interest was asserted in *Posadas.* Quite to the contrary, the Supreme Court recognized that the commonwealth of Puerto Rico (not the federal government) believed it was necessary to restrict advertisements relating to casino gaming.[263] In the instant case, the state of Louisiana has legalized gaming activities and has no prohibitions itself on the advertisement of such. Therefore, Louisiana's intention seems to encourage gaming, not to discourage it as in *Posadas.* Just as the Supreme Court deferred to Puerto Rico's power to discourage gambling by its residents, the Fifth Circuit should have deferred to Louisiana's interest in promoting gambling. Rather than follow this reasoning, the Fifth Circuit stated that the argument that "the federal government has no interest in discouraging casino gambling if Louisiana has legalized it...is contrary to Supreme Court precedent."[264] Again, however, the court fails to identify where its conclusion comes from; it cites no Supreme Court case supporting this statement.[265]

Indeed, the relevant Supreme Court precedent, *Edge Broadcasting*,[266] determined that the government's interest is not a general federal interest, but rather, an interest in protecting state choice on gambling issues. "[T]he Government has a substantial interest in supporting the policy of nonlottery States, *as well as not interfering with the policy of States that permit lotteries.*"[267] "This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies Central

259. 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1508 (1996) (Stevens, J., joined by Kennedy, J., and Ginsburg, J.).
260. 478 U.S. 328 (1986).
261. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1301 (5th Cir. 1995), *vacated,* 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)). This heavy reliance on *Posadas* is possibly the principal reason the Fifth Circuit's decision was vacated and remanded for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996). In *Liquormart,* four Justices declined to give force to *Posadas'* highly deferential approach. *Liquormart,* 116 S.Ct. at 1511-14. In fact, the four Justice opinion "conclude[d] that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate." *Id.* at 1511. *See supra* notes 138–40 and accompanying text.
262. The statute in question was P.R. LAWS ANN., tit. 15, § 77 (1972). *Posadas,* 478 U.S. at 332.
263. *Posadas,* 478 U.S. at 342.
264. *Greater New Orleans Broadcasting Ass'n,* 69 F.3d at 1300.
265. The court discusses *Rubin v. Coors Brewing Co.,* 115 S. Ct. 1585 (1995) in the next sentence of the opinion. *Rubin* supports the notion that the federal government has a substantial interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength. *Id.* at 1590. However, *Rubin* does not support the idea that the federal government can take it upon itself to determine that a particular interest is for the good of the health, safety, and welfare of state citizens when the state has determined otherwise.
266. 509 U.S. 418 (1993).
267. *Id.* at 426 (emphasis added).

Hudson"[268] not some general federal interest in discouraging participation in gaming activities.[269]

The Fifth Circuit nevertheless ruled that although the *Edge Broadcasting* Court held that the government has a substantial interest in protecting state choice in gambling decisions, *Edge Broadcasting* "did not determine the limit of a valid federal governmental interest."[270] The court then extended this limit by accepting a broad federal interest in discouraging gambling, erroneously citing *Posadas* as confirmation of such interest.

As to the third prong of *Central Hudson,* the Fifth Circuit ruled that "section 1304 easily satisfies the third prong of the *Central Hudson* test"[271] because there is a logical connection between advertising a product and demand for that product. This logical connection between advertising and demand was recognized in *Central Hudson*[272]and *Posadas.*[273] However, both of these cases predated *Edenfield v. Fane,*[274] where the Court announced a heavier burden of proof. Under *Edenfield v. Fane*[275] the third prong of *Central Hudson* requires the government to prove that the regulation advances the asserted government interest "in [a] direct and material way."[276] This burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[277]

The Fifth Circuit entirely ignored *Edenfield v. Fane.*[278] Consequently, the court failed to make the government prove the "harms it recites are real and that its restriction will in fact alleviate them to a material degree."[279] The government neither clarified what harms it sought to abate, nor proved that those harms were real and that the restrictions would in fact alleviate them. This failure is what led the court in *Valley Broadcasting*[280] to reject the government's asserted interest in retarding the growth of private gambling and

---

268. *Id.* at 428.

269. In fact, the federal government itself has operated a casino in California since 1990. The Bicycle Club was seized by the Justice Department, under the forfeiture laws, and turned over to the U.S. Marshals Service. Although the law directs the Justice Department to sell seized assets as quickly as possible, the federal government continues to operate the "sleazy, second-rate gambling casino." Why? Because the government has made more than $30 million from the casino, despite a 50% drop in profit levels since the government took it over. *60 Minutes: The Bicycle Club* (CBS television broadcast, Mar. 24, 1996) (transcript available on WESTLAW at 1996 WL 8064821).

270. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1300 (5th Cir. 1995), *vacated,* 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).

271. *Id.* at 1302.

272. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980).

273. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986).

274. 507 U.S. 761 (1993).

275. *Id.*

276. *Id.* at 771.

277. *Id.* at 770–71.

278. 507 U.S. 761 (1993).

279. *Id.* at 771.

280. Valley Broadcasting Co. v. United States, 820 F. Supp. 519 (D. Nev. 1993).

its perceived associated social ills.[281] Moreover, this failure may be one of the principal reasons the Fifth Circuit's decision was vacated and remanded[282] for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*.[283]

The Fifth Circuit also rejected the Broadcasters' argument that the numerous exceptions to 18 U.S.C. § 1304 render the statute ineffective in advancing the governmental interest,[284] noting that this argument was also rejected in *Edge Broadcasting*.[285]

Yet in *Rubin v. Coors Brewing Co.*,[286] the Court struck down legislation under the third prong of *Central Hudson*, as modified by *Edenfield v. Fane*,[287] because the statute in question was undermined by its failure to prohibit the same advertising in other contexts.[288] In this aspect, § 1304 is similar to the statutory scheme struck down in *Rubin*. The government's asserted interest embedded in § 1304 is "discouraging public participation in commercial gambling."[289] However, the government allows advertisements: (1) by state lotteries;[290] (2) by Indian gaming establishments including casinos;[291] (3) for the placing of bets on sporting events;[292] (4) by charitable lotteries;[293] (5) by

---

281. *Id.* at 525–26.
282. 117 S.Ct. 39 (1996).
283. 116 S.Ct. 1495 (1996). In *Liquormart*, four Justices specifically rejected Rhode Island's assertion that a prohibition on advertisement of liquor prices may decrease consumption and therefore directly advances the State's interest. *Id.* at 1509-10 (Stevens, J., joined by Kennedy, J., Souter, J., and Ginsburg, J.). "[T]he State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption." *Id.* at 1509. "As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *Id.* at 1510. Based on this same reasoning, the government's prohibitions in *Greater New Orleans Broadcasting* should not be upheld because the government has failed to offer any evidence that the speech prohibitions reduce the alleged harms.
284. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1301 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).
285. *Id.* In response to Edge's arguments that the lottery advertising prohibition would not prevent North Carolina's residents from hearing lottery advertisements as North Carolina residents could hear the ads on Virginia radio and television programs, the Court stated:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

United States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993).
286. 115 S. Ct. 1585 (1995).
287. 507 U.S. 761 (1993).
288. In *Rubin* the Court stated "[t]he failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars." 115 S. Ct. at 1592.
289. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1298 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).
290. 18 U.S.C. § 1307(a)(1) (1984 & Supp. 1996).
291. 25 U.S.C. § 2720 (West Supp. 1984–1995).
292. 18 U.S.C. § 1307(d) (1984 & Supp. 1996).
293. 18 U.S.C. § 1307(a)(2)(A) (1984 & Supp. 1996).

governmental lotteries;[294] and (6) by any lottery conducted by any commercial organization if that lottery is occasional and ancillary to the primary business of the advertiser.[295] Moreover, the casino advertising ban applies only to over-the-air broadcasts, which has been interpreted by the FCC to exclude advertisements on cable television stations.[296] Additionally, casino advertisements contained in billboards, flyers, outdoor advertising,. magazines, newspapers, direct mail, brochures, and other forms of advertising are not prohibited.

With all of these exceptions it is hard to comprehend how the advertising ban on broadcasts *materially* advances the government interest in discouraging participation in gambling. As the Court stated in *Rubin*, "[t]here is little chance that [the regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects."[297] Here, as in *Rubin*, there exist so many exceptions and inconsistencies in the regulatory scheme that it cannot directly and materially advance the asserted governmental interests. Thus, as it fails the third prong of *Central Hudson*, § 1304 is an unconstitutional infringement on the Broadcasters' freedom of speech.

As to the final prong of *Central Hudson*, the Fifth Circuit again relied on *Posadas*[298] and held that § 1304, like the Puerto Rican statute at issue in *Posadas*,[299] is narrowly tailored to achieve a substantial governmental interest.[300]

> Section 1304 is equally tailored to the asserted governmental interests because it prohibits only broadcast advertising aimed at the promotion of casino gambling. To the extent public demand for casino gambling is reduced by section 1304, one governmental interest is fulfilled. To the extent the broadcasters cannot beam casino gambling advertisements into neighboring states that do not license private casinos, the federal government's goal of assisting states' anti-gambling policies is fulfilled. No less restrictive alternative seems viable in view of the ability of broadcast signals across state borders.[301]

Again, however, the court misread *Posadas* and ignored persuasive language in *Edge Broadcasting*. The local regulations at issue in *Posadas* passed the fourth prong of the *Central Hudson* test only because the advertising restrictions were narrowed by the superior court to apply solely to advertisements aimed at local residents.[302] Indeed, the superior court stated that

---

294. 18 U.S.C. § 1307 (a)(2)(A) (1984 & Supp. 1996).
295. 18 U.S.C. § 1307 (a)(2)(B) (1984 & Supp. 1996).
296. 47 C.F.R. § 76.213 (1996).
297. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995).
298. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).
299. *See supra* note 114.
300. Greater New Orleans Broadcasting Ass'n v. United States, 69 F.3d 1296, 1302 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)).
301. *Id.*
302. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 343 (1986). "The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico." *Id.*

Posadas' constitutional rights had been violated by the application of the advertising restrictions as they existed before the modification.[303] In a sense, then, the *Posadas* modification can be thought of as a less restrictive alternative, or an alternative that facilitates a closer "fit" between Puerto Rico's goal of discouraging gambling by its residents and the means chosen to achieve that goal.

In contrast to *Posadas,* the advertising prohibition in *Greater New Orleans Broadcasting Ass'n*[304] applied as a complete ban, regardless of who the audience was. The logical solution which follows from *Posadas* and *Edge Broadcasting* is to allow gaming advertising broadcasts in states where the particular gambling game is legal. This solution acknowledges and respects each state's choice on gambling issues. Surely this is a less restrictive alternative that more closely fits the government's interest in protecting state choice on gambling issues. This alternative should have been adopted by the Fifth Circuit Court of Appeals as a less restrictive alternative.

Instead, however, the court stated "[n]o less restrictive alternative seems viable in view of the ability of broadcast signals to cross state borders."[305] Yet, the ability of broadcast signals to cross state borders has been rendered irrelevant by legislative action.[306] The approach recognized by Congress is based on the origination of the broadcast within a lottery state, not the ability of the signal to cross state borders. For example, Congress has refused to restrict advertising based on signal coverage for charitable lotteries,[307] governmental lotteries,[308] lotteries conducted by any commercial organization if that lottery is occasional and ancillary to the primary business of the advertiser,[309] and for the placing of bets on sporting events.[310] Moreover, it appears that Indian run casinos may advertise not only where their casinos are legal, but in any state they wish.[311] There is no restriction in any of these forms of gaming which limit their advertisements based on signal coverage. If Congress' true interest was to protect state choice on gambling issues, and this interest was predicated on the ability of a broadcast signal to reach across state borders, then there would be signal restrictions on the exceptions contained in § 1307. The United States Supreme Court recognized as much in *Edge Broadcasting*[312] where the Court stated:

> [Congress] did not forbid stations in a lottery State...from carrying lottery ads if their signals reached into an adjoining State...where lotteries were illegal. Instead of favoring either the lottery or the nonlottery State, Congress opted...not to unduly interfere with the policy of a lottery sponsoring State.... [A lottery State] could advertise

---

303. *Id.* at 336–37.
304. *Greater New Orleans Broadcasting,* 69 F.3d 1296 (5th Cir. 1995), *vacated,* 117 S. Ct. 39 (1996).
305. *Id.* at 1302.
306. *See* 18 U.S.C. § 1307.
307. 18 U.S.C. § 1307(a)(2)(A).
308. *Id.*
309. 18 U.S.C. § 1307 (a)(2)(B).
310. 18 U.S.C. § 1307(d).
311. 25 U.S.C. § 2720 (1996). *See supra* note 11. *See also* NATIONAL ASSOCIATION OF BROADCASTERS, LOTTERIES & CONTESTS, A BROADCASTERS HANDBOOK, (3d ed. 1990).
312. United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

> its lottery through radio and television stations licensed to [that State] even if their signals reached deep into [a nonlottery State].[313]

This simple solution based on state boundaries is the same resolution that should be applied in casino advertising cases. Under this approach, broadcasting stations licensed to states where casino gambling is legal would be able to advertise those games. This logical solution is the closest fit possible to advance the recognized governmental "interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries."[314] It is also the solution that led the district court in *Valley Broadcasting*[315] to state:

> In attempting to satisfy the interests of federalism and still respect the public policy views of both lottery and non-lottery states, Congress reached a sensible accommodation by limiting the broadcast of lottery advertisements to television or radio stations located within states which permit such activity. This Court fails to see why such a common sense restriction, which is undoubtedly less restrictive than Defendants' complete ban, would not equally apply with respect to casino and non-casino states.[316]

## VI. CONCLUSION AND PROPOSALS

It is clear that 18 U.S.C. § 1304 and its predecessors were enacted to prohibit lotteries in the commonsense meaning of that word.[317] The statutes were not passed to prohibit the advertisements of casino gambling activities. However, if the FCC and the courts choose to define casino gambling games as lotteries, then they should treat such games as lotteries. Namely, they should except these games from the prohibitions set forth by section 1304 just as every other type of lottery has been excepted from this ban.

The simple and logical solution is to allow broadcasters, licensed to states where gambling is authorized by law, to broadcast commercials regarding legal casino activities in that state.[318] Another commonsensical resolution is to allow

---

313. *Id.* at 428.
314. *Id.* at 426.
315. Valley Broadcasting Co. v. United States, 820 F. Supp. 519 (D. Nev. 1993).
316. *Id.* at 527 (citations omitted).
317. *See supra* notes 2, 48–69.
318. If these solutions are not adopted by either the courts or Congress, then another argument, although much weaker than those previously discussed in this Note, is for a willing state agency or nonprofit organization, such as state or city tourism agencies, to challenge § 1304 by advertising on behalf of private casinos under 18 U.S.C. § 1307(a)(2)(A) which provides:

> (a) The provisions of section 1301, 1302, 1303, and 1304 shall not apply to ...
>
> (2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme...that is authorized or not otherwise prohibited by the State in which it is conducted and which is --
>
> (A) conducted by a not-for-profit organization or a governmental organization;
>
> ....
>
> (d) For the purposes of this section, the term a 'not-for-profit organization' means any organization that would qualify as tax exempt under [Title 26] section 501 of the Internal Revenue Code of 1986.

The state agency or nonprofit organization can argue that under § 1307 they are allowed to broadcast "an advertisement...concerning a lottery...that is authorized or not otherwise prohibited by the State in which it is conducted and which is...conducted by a not-for-profit

stations licensed in states where casino gambling is legal to broadcast all casino advertisements, whether or not the casino is in the state. Either solution would recognize the federal government's interest in protecting state choice on gambling issues.[319]

organization or a governmental organization." The ambiguity the state agency or nonprofit organization would be challenging is whether the words "and which is conducted by a not-for-profit organization or a governmental organization," 18 U.S.C. § 1307(a)(2)(A), refers to who is conducting the advertisement or who is conducting the lottery. The language suggests that it refers to who is conducting the lottery. Thus, a state or nonprofit organization would probably lose on this argument if they are not the one conducting the lottery.

319. See supra notes 305–16 and accompanying text.