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Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?

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Cover Page Footnote

Charles Whelan, Family, Friends

NOTE

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Megan E. Frese*

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INTRODUCTION

Gambling is a longstanding and major entertainment industry in the United States,[1] and the recent proliferation of sports betting and casino-style gambling websites has made it "more accessible than ever before."[2] There are an estimated 1800 Internet gambling operations currently in existence,[3] most based outside the United States—generally in the Caribbean, Costa Rica or Great Britain, where they are legal and licensed.[4] However, up to 70% of all bets

[1] *See* Edward A. Taggert, *Wide-Open City: Gambling, Prostitution Flourish in Tony Moran Era*, *at* http://www.berkshistory.org/articles/moran.html (last visited Mar. 4, 2005) ("If drinking illegal alcoholic beverages was regarded as the No.1 vice during Prohibition, gambling was not far behind. The Roarin' Twenties popularized slot machines, pinball machines, the numbers game and other lotteries, and horse betting parlors."); *cf.* Todd A. Lubben, *The Federal Government and Regulation of Internet Sports Gambling*, 10 SPORTS LAW. J. 317, 317 (2003).

[2] *See* Lubben, *supra* note 1.

[3] *Web Site Sues for Right to Run Gambling Ads*, ADVOC. (Baton Rouge, La.), Aug. 17, 2004, at 2B.

[4] Matt Richtel, *Electronic Arts to Stop Advertising for Online Casinos on Its Website*, N.Y. TIMES, June 12, 2004, at C1 [hereinafter Richtel, *Electronic Arts*]; *see also* Matt

come from within the United States,[5] where there is intense debate over the legality of Internet gambling under federal law.[6]

Revenue from online gambling websites exceeded $6 billion in 2003 and was projected to reach more than $7 billion in 2004.[7] Seeking to capitalize on this extremely lucrative market, numerous American corporations began accepting advertisements from offshore gambling websites in the late 1990s.[8] However, the United States Department of Justice ("DOJ") warned media trade groups in June 2003 that accepting advertisements from gambling websites might constitute "aiding and abetting" illegal operations.[9] Thereafter, the DOJ began taking action against some online gambling advertisers.[10]

On August 9, 2004, Casino City, Inc. filed a complaint against the DOJ seeking a "declaratory judgment that advertising online casinos and sportsbooks is constitutionally protected commercial free speech under the First Amendment of the United States."[11] Casino City is a Louisiana corporation that disseminates gambling information, news, strategies, and tips on its websites.[12] Although "Casino City does not conduct or participate in online casino or

Richtel, *U.S. Steps Up Push Against Online Casinos by Seizing Cash*, N.Y. TIMES, May 31, 2004, at C1 [hereinafter Richtel, *U.S. Against Online Casinos*].

5 *See Web Site Sues for Right to Run Gambling Ads*, *supra* note 3.

6 *See* Gregory Manter, *The Pending Determination of the Legality of Internet Gambling in the United States*, 2003 DUKE L. & TECH. REV. 16, July 11, 2003, ¶ 10.

7 *Web Site Sues for Right to Run Gambling Ads*, *supra* note 3; *see also* Matt Richtel, *Companies Aiding Internet Gambling Feel U.S. Pressure*, N.Y. TIMES, Mar. 15, 2004, at A1.

8 Lawrence G. Walters, *Advertising Online Casinos: An Analysis of the Legal Rights and Risks*, 7 GAMING L. REV. 111, 111 (2003).

9 Richtel, *U.S. Against Online Casinos*, *supra* note 4; *see also Casino City Files Suit Against U.S. Department of Justice to Establish its First Amendment Right to Advertise Online Casinos and Sportsbooks*, *at* http://online.casinocity.com/FirstAmendment (Aug. 9, 2004) [hereinafter *Casino City First Amendment Complaint Overview*].

10 *See, e.g.*, Richtel, *U.S. Against Online Casinos*, *supra* note 4 ("United States marshals seized $3.2 million from Discovery Communications, the television and media company, in an aggressive effort to crack down on a new target, Internet gambling.").

11 *See Casino City First Amendment Complaint Overview*, *supra* note 9; *see also* Richtel, *U.S. Against Online Casinos*, *supra* note 4. Notably, as of May 2004, "executives at media companies [had] not voiced public challenges to the government campaign." *Id.*

12 Complaint at 1, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

sports book activities,"[13] a portion of its revenues are derived from advertisements for "lawful overseas companies that offer online casino or sports book gambling."[14] The Justice Department filed a motion to dismiss Casino City's complaint on October 29, 2004.[15]

Because the development of Internet gambling advertising law is still in its nascent stages, the outcome of Casino City's action will have significant ramifications for media companies, the federal government, and Internet gambling operations alike.[16] The Justice Department argues that current federal law prohibits Internet gambling[17] and that advertising for this "illegal" activity falls outside the protection of the First Amendment.[18] However, some legal experts contend that American companies' advertisements may be protected by the First Amendment regardless of the legality of online gambling in the United States,[19] and that the "'aiding and abetting' legal theory is . . . controversial and unprove[n]."[20] Thus, at this point, "the legality of online gambling itself is still an open question as a result of conflicting court decisions and stalled legislation, [and] the legal issues relating to advertising online gambling services are even more obscure."[21]

This Note analyzes Casino City's declaratory judgment action to determine whether the DOJ constitutionally may prohibit Internet gambling advertising, or whether these advertisements are First Amendment-protected commercial speech. Part I.A introduces the federal gambling laws at issue in this case. Part I.B summarizes the Supreme Court's development of the commercial speech doctrine, focusing on the Court's First Amendment treatment of advertisements for "vice" activities like gambling.

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13 *Id.* at 3.

14 *Id.*

15 *See generally* Memorandum of Law in Support of Defendant's Motion to Dismiss, *Casino City* (No. 04-557-B-M3).

16 *Cf. Casino City First Amendment Complaint Overview*, *supra* note 9.

17 Memorandum of Law in Support of Defendant's Motion to Dismiss at 18–19, *Casino City* (No. 04-557-B-M3).

18 *Id.*

19 *See* Richtel, *U.S. Against Online Casinos*, *supra* note 4.

20 *See* Richtel, *Electronic Arts*, *supra* note 4.

21 Walters, *supra* note 8, at 111.

Part II.A outlines the federal government's argument that advertising for gambling websites constitutes "aiding and abetting" illegal activity, and Part II.B explains Casino City's argument that these advertisements are First Amendment-protected commercial speech. Finally, Part III concludes that the federal government may prohibit American corporations from advertising sports wagering websites because Internet sports betting is illegal under federal law. However, the government may not restrict advertising for other forms of Internet gambling because these gambling activities are currently not illegal under any federal laws and do not satisfy the United States Supreme Court's requirements for restricting lawful and nonmisleading commercial speech.

I. GOVERNMENT REGULATION OF GAMBLING AND COMMERCIAL SPEECH

Traditionally, the United States government has not taken a strong or active role in gambling regulation.[22] In general, the federal government has left primary responsibility for setting and enforcing gambling policy to the individual states.[23] Nevertheless, Congress has utilized its power under the Commerce Clause to enact federal gambling laws "where constitutional provisions, such as with Indian gambling, were relevant, where there was concern for the involvement of organized crime, or where the federal government might have to settle a dispute between states."[24] Congress has also utilized its powers to restrict certain gambling activities and advertising based on the perceived well-being of the United States public.[25] As a result, the law of Internet gambling advertising involves the intersection of proposed federal Internet gambling legislation, existing federal gambling and gambling

[22] *See* James H. Frey, *Gambling: Socioeconomic Impacts and Public Policy: Federal Involvement in U.S. Gaming Regulation*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 139 (1998).

[23] *See* Anthony N. Cabot and Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 14 (2002).

[24] Frey, *supra* note 22, at 139, 141.

[25] *Cf. id.* at 141.

advertising law, state gambling regulations, and First Amendment commercial speech.[26]

A. The Federal Government's Efforts to Prohibit Internet Gambling

The federal government contends that Internet gambling is illegal under federal law, and that it can prosecute Internet gambling advertisers for "aiding and abetting" illegal activity.[27] Congress has been unable to promulgate any legislation that

[26] The states' treatment of Internet gambling is outside the scope of this Note. In brief, state imposed Internet gambling laws differ from state to state. The variation between state laws further complicates the legal analysis of Internet gambling. Several states, including Illinois, Louisiana, Nevada, Oregon, South Dakota, and Wisconsin, have expressly outlawed Internet gambling. *See* Chuck Humphrey, *State Gambling Law Summary*, *at* http://www.gambling-law-us.com/State-Law-Summary (last visited Feb. 25, 2005). In addition, online gambling is illegal in states that prohibit all types of gambling, such as Utah. *See* U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 16 (Rep. No. GAO-03-89) (2002) [hereinafter GAO INTERNET GAMBLING REPORT], *at* http://www.gao.gov/new.items/d0389.pdf. New York courts have held that Internet gambling is illegal there under existing state law. *See* United States v. Cohen, 260 F.3d 68, 73 (2d Cir. 2001) (citing N.Y. CONST. art. I, § 9; N.Y. GEN. OBLIG. LAW § 5-401). Both the New York Constitution and General Obligations Law prohibit all betting, other than certain exceptions for lotteries and horseracing. *Id.* Not surprisingly, the gambling states Nevada and New Jersey have considered legalizing some forms of Internet gambling. The State Legislature of New Jersey recently defeated a proposal that would have allowed Atlantic City casinos to go online. *See* M.A. Mehta, *Critics Warn that N.J.'s New Online Wagering Could Leave Bettors . . . Going for Broke*, STAR-LEDGER (Newark, NJ), Nov. 19, 2004, at 51. In July 1997, Nevada Governor Bob Miller signed a bill that created the misdemeanor of making or accepting a bet over the Internet from a player located in Nevada. *See* Nelson Rose, *America Boldly Outlaws (and Quietly Legalizes) Internet Gambling*, *at* http://www.gamblingandthelaw.com/amountlaw.html (last visited Feb. 25, 2005). However, the bill carved out an exception that "making and accepting bets on the Internet [were] legal, if the wagers were accepted in Nevada by Nevada-licensed race and sports books and casinos." *See id.* In 2001, Nevada lawmakers voted "to give the Nevada Gaming Commission . . . the authority to develop rules for casino operators to launch and maintain online gambling establishments within the state," and to promulgate guidelines for such establishments that adhered to state and federal gambling regulations. *See* Craig Lang, Note & Comment, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 535–36 (2002). However, Nevada has not moved forward with its Internet gambling plans due to opposition by the federal government. *Id.* at 526–27.

[27] Memorandum of Law in Support of Defendant's Motion to Dismiss at 19, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

explicitly outlaws Internet gambling.[28] However, existing federal laws proscribe a wide range of gambling activities that reasonably could be interpreted to include Internet gambling,[29] and there are federal statutes that curtail the advertising of certain gambling activities.[30] At the same time, other federal laws sanction some forms of gambling, such as state-run lotteries, and casino gambling for Native American tribes.[31] These favored gambling activities are exempt from most of the federal gambling advertising restrictions.[32]

1. The DOJ's Campaign against Internet Gambling Advertisers

The federal government began its campaign to prohibit American corporations from advertising online gambling websites in June 2003, when the DOJ sent letters to trade groups representing major broadcasters and publishers, i.e., the National Association of Broadcasters, the Magazine Publishers of America, the Independent Press Association, and the National Newspaper Association.[33] The trade groups were advised to warn their members that they "could be violating [federal] law by displaying advertisements on behalf of offshore casinos,"[34] that they "could be seen as 'aiding and abetting' the activities of the [online] casinos,"[35] and that "individuals accepting such advertisements might face prosecution."[36]

Thereafter, the United States Attorney's office in St. Louis convened a grand jury to investigate American companies doing business with offshore casinos.[37] As part of this investigation, the

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28 *See* Manter, *supra* note 6, ¶ 3; *see also* discussion *infra* Part I.A.2.

29 *Cf.* Walters, *supra* note 8, at 115; *see also* discussion *infra* Part I.A.3.

30 *See* discussion *infra* Part I.A.4.

31 *See* Walters, *supra* note 8, at 114; Frey, *supra* note 22, at 147–48.

32 *See* Walters, *supra* note 8, at 114; *see also infra* notes 120, 122–125 and accompanying text.

33 *See Casino City First Amendment Complaint Overview*, *supra* note 9.

34 Richtel, *U.S. Against Online Casinos*, *supra* note 4.

35 *Id.*

36 *Casino City First Amendment Complaint Overview*, *supra* note 9.

37 *See* Richtel, *Electronic Arts*, *supra* note 4; Richtel, *U.S. Against Online Casinos*, *supra* note 4.

Justice Department sent subpoenas to a variety of media outlets, Internet portals, public relations firms, and other companies, seeking information about their connections to "offshore casinos" as well as the purchase and placement of online sportsbook and casino advertisements.[38]

Then, in April 2004, the DOJ sent U.S. marshals to seize $3.2 million in advertising proceeds from Discovery Communications.[39] The money had been paid to Discovery Networks in October 2003 by Tropical Paradise, an online casino company based in Costa Rica, for television spots to advertise an online poker room during the Travel Channel's broadcast of the "World Poker Tour."[40] "According to court documents, the government seized the money and told Discovery . . . that it could be party to an illegal activity by broadcasting the advertisements."[41] Following this seizure, Discovery Networks stopped accepting advertisements for online casinos and sportsbooks.[42]

To avoid prosecution by the DOJ, other major broadcasters, including Infinity Broadcasting and Clear Channel Communications, stopped accepting online gambling advertisements in the fall of 2003.[43] Popular Internet portals Google and Yahoo followed suit in April 2004.[44] Yahoo acknowledged that "'a lack of clarity in the environment' made gambling advertising 'too risky.'"[45] In June 2004, the video game giant Electronic Arts decided to stop running Internet casino advertisements on its website as well.[46]

The Justice Department's actions have rippled beyond the realm of advertising. Many American financial institutions have taken independent steps to prohibit transactions between gamblers

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38 *See Casino City First Amendment Complaint Overview*, *supra* note 9; Richtel, *U.S. Against Online Casinos*, *supra* note 4.

39 *See* Richtel, *U.S. Against Online Casinos*, *supra* note 4.

40 *See id.*

41 *Id.*

42 *See id.*

43 *See id.*; *Casino City First Amendment Complaint Overview*, *supra* note 9.

44 *See Casino City First Amendment Complaint Overview*, *supra* note 9.

45 Jacob Sullum, *Abetting Betting: Is Talking About Online Gambling Illegal?*, *at* http://reason.com/sullum/040904.shtml (Apr. 9, 2004).

46 *See* Richtel, *Electronic Arts*, *supra* note 4.

and Internet gambling websites due to the uncertain legal climate and their assessment of online gambling as a high risk industry.[47] For example, both American Express and Discover credit cards cannot be used for Internet gambling.[48] Furthermore, although MasterCard and Visa do not uniformly restrict the use of their credit cards for Internet gambling, they have developed procedures that allow "member banks" to block certain transactions.[49] Some of America's largest banks, including Citibank, Bank of America, and Wells Fargo, prohibit their credit cards from being used for online gambling transactions.[50] The same is true for dominant credit card issuers such as MBNA, Capital One, and Providian Financial.[51] Even the London-based Hong Kong and Shanghai Banking Corporation ("HSBC") now bars these transactions.[52] Gamblers have also encountered obstacles when adding money to their gambling accounts through digital money services.[53] Numerous electronic money services, including PayPal, have abandoned this "extremely lucrative market."[54]

As a result of the DOJ's actions, Casino City alleges that it lost several important advertising deals that would have formed an important part of the gambling news source's revenue.[55] Before the DOJ's crackdown, Casino City's parent corporation had plans with A&E Television Networks to promote a "Breaking Vegas" documentary and an associated sweepstakes in which Casino City

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47 *See generally* GAO INTERNET GAMBLING REPORT, *supra* note 26.

48 *See id.* at 24.

49 *See id.* at 21.

50 *See* Nelson Rose, *Why Visa Is Dropping Online Gambling*, 7 GAMING L. REV. 243, 243 (2003). In the case of Citibank, New York Attorney General Eliot Spitzer heavily influenced this decision. *See* Manter, *supra* note 6, ¶ 8 ("Spitzer accused the credit card company of knowingly profiting from an illegal activity. This allegation, if prosecuted, could have resulted in criminal liability under New York law. Citibank denied any wrongdoing but agreed to contribute $400,000 to compulsive gambler counseling services.").

51 Rose, *supra* note 50, at 243.

52 *See id.*

53 *See id.* Eliot Spitzer pursued PayPal after his successful confrontation with Citibank. *See* Manter, *supra* note 6, ¶ 9. Although PayPal declared that it had already agreed to prohibit gambling transactions as part of its acquisition by eBay, PayPal settled with the State of New York for $200,000 in disgorged profits. *Id.*

54 Rose, *supra* note 50, at 243.

55 *See Casino City First Amendment Complaint Overview*, *supra* note 9.

was to be featured on the History Channel website and in thirty national television commercials.[56] A&E began promotion for the company, but then cancelled the partnership agreement.[57] A&E felt there was an "unacceptable risk" that it would be viewed as aiding and abetting online gambling, since Casino City's home page provided links to online gambling websites.[58] In addition, Casino City CEO Mr. Corfman proffered that a major Las Vegas casino had wanted to work with Casino City's parent corporation on a separate promotion, but that its lawyers had called off the arrangement because of Casino City's involvement with online gambling.[59] The Justice Department considers its actions to be justified because it believes that Internet gambling is illegal under federal law, and there is no First Amendment right to advertise illegal activity.[60]

2. Federal Efforts to Enact Anti-Internet Gambling Legislation

The DOJ's claim that there is no First Amendment right to advertise illegal activity rests on the premise that Internet gambling is illegal under existing, non-Internet specific, federal law.[61] Congress has been unsuccessful thus far in its attempts to pass legislation that specifically outlaws Internet gambling.[62] It first sought to prohibit Internet gambling as early as 1995, which was when the first casino appeared on the Internet.[63] "As part of his 1995 Crime Prevention Act, Senator John Kyl [(R-Arizona)] introduced a provision that would make it illegal for an individual to participate in Internet gambling if gambling was illegal in that person's state;"[64] however, the bill was defeated in committee.[65]

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56 *See id.*
57 *See id.*
58 *See id.*
59 *Id.*
60 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 17, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).
61 *See infra* notes 79–83 and accompanying text.
62 *See* Lang, *supra* note 26, at 535–36
63 *See id.* at 535.
64 *Id.*
65 *See id.*

The following year, Congress created the National Gambling Impact Study Commission to study the "social and economic impacts" of gambling—including online betting—on the American public.[66] The Commission issued its final report in 1999, which recommended: "(1) that the federal government prohibit any Internet gambling not already authorized and encourage foreign governments not to harbor Internet gambling organizations, and (2) that Congress pass legislation prohibiting the collection of credit card debt for Internet gambling."[67] The Commission raised social and economic concerns about online gambling including "underage gambling, pathological gambling, lack of consumer protections, and money laundering."[68] In response to these issues, Congress asked the United States General Accounting Office ("GAO") to study the relationship between United States payment systems, particularly credit cards, and Internet gambling.[69]

Another result of the Commission's report was the numerous bills to prohibit online gambling that were introduced in Congress.[70] In 2000, the Senate unanimously passed a bill that created a new statute to prohibit Internet gambling.[71] This bill failed, however, to receive the two-thirds support it needed to pass in the House.[72] In 2002, the House of Representatives passed its own Internet gambling bill after a series of unsuccessful attempts.[73] The Internet Gambling Enforcement Act[74] (or "Leach Act") was introduced by Representatives Jim Leach (R-Iowa) and John DeFalce (D-NY), in an attempt to "limit U.S. access to Internet gambling sites hosted on offshore servers . . . by prohibiting Internet gambling businesses from accepting credit, electronic funds transfers, checks or drafts from would-be American Internet gamblers."[75] The bill also "implicate[d] financial institutions that

66 *See* GAO INTERNET GAMBLING REPORT, *supra* note 26, at 1.
67 *Id.*
68 *Id.* at 2.
69 *Id.*
70 *See id.* at 7–8.
71 *See* Lang, *supra* note 26, at 535. The bill was called the "Internet Gambling Prohibition Act." *Id.*
72 *See id.* at 535–36.
73 *See* Manter, *supra* note 6, ¶ 4.
74 H.R. 556, 107th Cong. (2002).
75 Manter, *supra* note 6, ¶ 4.

may [have] knowingly act[ed] as intermediate agents between gamblers and the Internet gaming business."[76] The Leach Act, however, died in the Senate without being put to a vote,[77] and subsequent efforts by Congress to pass Internet gambling legislation have met no better fate.[78]

3. Existing Federal Anti-Gambling Statutes

Despite Congress' failure to pass anti-Internet gambling legislation, the DOJ maintains that Internet gambling is already illegal under existing federal laws.[79] In its motion to dismiss the complaint of Casino City, the DOJ argued that Internet gambling is illegal under the Wire Act,[80] the Travel Act,[81] and the Illegal Gambling Business Act.[82] Therefore, the DOJ can prosecute those

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[76] *See id.*

[77] *See id.* at ¶ 7.

[78] *See id.*

[79] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 18–19, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

[80] Pub. L. No. 87-216, 75 Stat. 491 (codified as amended at 18 U.S.C. § 1084 (2000)).

[81] Pub. L. No. 87-228, § 1(a), 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 (2000 & Supp. 2002)).

[82] Pub. L. No. 91-452, § 803(a), 84 Stat. 937 (codified as amended at 18 U.S.C. § 1955 (2000)). The Professional and Amateur Sports Protection Act of 1992 ("PASPA") also supports the DOJ's contention that online sports betting is illegal under federal law. Pub. L. No. 102-559, § 2(a), 106 Stat. 4227 (codified as amended at 28 U.S.C. §§ 3701–04 (2000)). PASPA makes it unlawful for any State, Indian tribe, or person "to sponsor, operate, advertise, promote, license, or authorize by law or compact" any lottery or gambling scheme "based directly or indirectly . . . on . . . competitive games in which amateur or professional athletes participate." *Id.* § 3702. PASPA has two major exemptions. *Id.* § 3704(a). Subsection (a) has a total of four exceptions, however. *See id.* § 3704(a). First, lawful sports gambling schemes that were in operation when the bill was introduced were allowed to continue. *Id.* § 3704(a). This exemption preserved the licensed sports pools that existed in Nevada, Oregon, Delaware, and Montana when the statute was promulgated, but "barred additional states from sponsoring sports-based lotteries or betting pools on college [or] professional sports." Frey, *supra* note 22, at 146; *see also* Jeffrey Rodefer, *Professional and Amateur Sports Protection Act of 1992*, http://www.gambling-law-us.com/Federal-Laws/sports-protection.htm (last visited Feb. 25, 2005). Second, PASPA also exempts gambling on jai-alai and pari-mutuel horse and dog racing. 28 U.S.C. § 3704(a)(4). Notably, however, the DOJ has not cited PASPA in support of its advertising restrictions or the contention that Internet gambling is illegal under federal law. *See* Rodefer, *supra*; *see, e.g.*, Memorandum of Law in Support of Defendant's Motion to Dismiss, *Casino City* (No. 04-557-B-M3). The DOJ strongly opposed the passage of PASPA since it believed the statute constituted a substantial

who advertise this "illegal" gambling activity under the "aiding and abetting" statute.[83]

a) The Wire Act

The Wire Act was enacted by Congress in 1961 "as part of a series of antiracketeering laws."[84] The goal of the Wire Act is to assist the States "in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of . . . wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce."[85] Specifically, the Wire Act makes illegal the use of a "wire communication facility" for the transmission of bets or wagers on any "sporting event or contest" in interstate or foreign commerce.[86] In general, two elements must be present for a violation of the Wire Act: (1) the information transmitted by wire

intrusion on states' rights. *See* Rodefer, *supra* (citing 1992 U.S. CODE & CONG. NEWS 3563). To date, the only reported case to interpret PASPA is Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999), in which the Supreme Court acknowledged that the statute's exemptions made the scope of its advertising prohibition "somewhat unclear." *Id.* at 180; *see also* Rodefer, *supra*. Because the DOJ has been unwilling to utilize PASPA in any context, the statute will not be considered in this Note.

[83] *See* 18 U.S.C. § 2 (2000).

[84] Jeffrey Rodefer, *Federal Wire Wager Act*, http://www.gambling-law-us.com/Federal-Laws/wire-act.htm (last visited Feb. 1, 2005).

[85] David B. McGinty, *The Near-Regulation of Online Sports Wagering by United States v. Cohen*, 7 GAMING L. REV. 205, 209 (2003) (citing Letter from Robert F. Kennedy, United States Attorney General, to Speaker of the House of Representatives (Apr. 6, 1961) (found in H.R. Rep. No. 87-967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633); Martin v. United States, 389 F.2d 895 (5th Cir. 1968)). The Justice Department has traditionally utilized the Wire Act to prosecute bookies who accepted and completed bets over the telephone from people in jurisdictions where gambling is illegal. *See id.*

[86] 18 U.S.C. § 1084(a) (2000). The full text of subsection (a) of the Wire Act provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this titled or imprisoned not more than two years, or both.

Id.

must have assisted in the placing of bets or wagers, and (2) the defendant must have been engaged in the business of wagering or betting during the time of transmission.[87]

The Wire Act has several limitations, however. First, the statute was specifically enacted to prohibit sports betting, and is ambiguous on other gambling activities.[88] Second, the statute does not apply to any pari-mutuel betting, such as horse or dog racing, that is lawful under many states' laws.[89] Third, subsection (b) of the Wire Act contains a safe harbor clause.[90] The first safe harbor exempts the transmission of information "for use in news reporting

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[87] *See* Truchinski v. United States, 393 F.2d 627, 630 (8th Cir. 1968).

[88] *See* 18 U.S.C. § 1084(a).

[89] *See* United States v. Donaway, 447 F.2d 940, 942 (9th Cir. 1971). Pari-mutuel wagering is a system of wagering in which bettors bet against one another instead of against the house. For pari-mutuel wagering, the money bet on a race is pooled, and approximately 80 percent is returned to the winning bettor. The remaining 20 percent (the takeout) is distributed among the state government, the jockeys that race at the track, and the racetrack owners. The amount allotted for the takeout varies among states. *See Para-Mutuel Betting*, *at* http://www.encyclopedia.com/html/p1/parimutu.asp (last visited Feb. 26, 2005); GAO INTERNET GAMBLING REPORT, *supra* note 26, at 15 n.30. Horseracing provides a unique departure from other federal gambling laws. In 1978, Congress passed the Interstate Horseracing Act ("IHA") to regulate and promote interstate commerce with regard to pari-mutuel wagering on horseracing. Pub. L. No. 95-515, § 2, 92 Stat. 1811 (codified as amended at 15 U.S.C. § 3001–07 (2000)). Under the authority of the IHA, numerous states developed systems of pari-mutuel wagering on state-licensed horse races over the Internet. *See* GAO INTERNET GAMBLING REPORT, *supra* note 26, at 15. However, "[i]n March 2000, DOJ officials testified [before the House Subcommittee on Crime] that it was a violation of the Wire Act . . . to offer bets on horserace[ing] over the Internet." *Id.* at 16. Because the Wire Act is a criminal statute, the DOJ insisted that IHA, which is a civil statute, could not override it. *Id.* at 43. IHA, however, was amended in December 2000 "to explicitly expand interstate off-track wagers to include wagers through the telephone or other electronic media." *Id.* at 16. Currently, no suits have been brought by the DOJ against the aforementioned "state-licensed horse racing tracks." *Id.* at 16. Nevertheless, given the DOJ's testimony that the Wire Act trumps IHA, the DOJ's current position on the legality of interstate Internet wagering on state-licensed horseracing is unclear. However, the IHA and associated issues are outside the scope of this Note.

[90] The full text of subsection (b) of the Wire Act provides:

> Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

18 U.S.C. § 1084(b).

of sporting events or contests."[91] The second safe harbor permits the transmission of information relating to betting on particular sports where such betting was legal in both the state from which the information was sent and the state in which it was received.[92] In addition, for the second safe harbor to apply, the information comprising the transmission must "merely assist" in the placing of the bets.[93] Despite these exceptions, the DOJ can utilize the Wire Act to harness many types of illegal gambling operations, especially sports gambling, since the text of the statute specifically prohibits the transmission of bets or wagers on any "sporting event or contest."[94]

b) The Travel Act

The Travel Act was enacted in 1961[95] to provide federal assistance in situations in which local law enforcement was ineffective in attacking criminal activities that extended beyond the borders of its state.[96] The Travel Act is aimed at prohibiting interstate travel "with the intent to engage in certain unlawful behaviors," including the business of gambling.[97] Thus, the Travel Act makes it a crime to travel in interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, commit any violent crime to further any unlawful activity, or otherwise promote, manage, establish, carry on, or facilitate any unlawful activity.[98]

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91 *Id.*

92 *Id.*; *see also* Sterling Suffolk Racecourse Ltd. v. Burrillville Racing Ass'n, 989 F.2d 1266, 1272–73 (1st Cir. 1993).

93 *See* GAO INTERNET GAMBLING REPORT, *supra* note 26, at 13.

94 *See* 18 U.S.C. § 1084.

95 Jeffrey Rodefer, *Federal Travel Act Scope and Predicates*, http://www.gambling-law-us.com/Federal-Laws/travel-act.htm (last visited Feb. 26, 2005) (citation omitted).

96 United States v. Altobella, 442 F.2d 310, 313 (7th Cir. 1971).

97 Frey, *supra* note 22, at 142.

98 The Travel Act provides, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce with intent to—
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> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime in violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

"The Travel Act 'refers to state law only to identify [a] defendant's unlawful activity.'"[99] Therefore, a conviction under the Travel Act necessitates a violation of either a state or local law.[100] Under the Travel Act, the term "unlawful activity" includes any business enterprise involving illegal gambling.[101] Courts have held that the use of "the mail, telephone or telegraph, newspapers, credit cards and tickertapes is sufficient to establish that a defendant 'used a facility of interstate commerce' to further an unlawful activity in violation of the Travel Act."[102]

c) The Illegal Gambling Business Act

Congress promulgated the Illegal Gambling Business Act as part of the Organized Crime Control Act of 1970.[103] This Act targets syndicated gambling on the theory that large-scale illegal gambling operations finance organized crime, which, in turn, has a significant impact on interstate commerce.[104] It is a crime under the Illegal Gambling Business Act to operate an illegal gambling business, which is defined as a gambling operation that (1) is in violation of state or local law where it is conducted, (2) involves five or more persons that conduct, finance, manage, supervise, direct, or own all or part of the business, and (3) remains in substantially continuous operation for more than thirty days or has a gross revenue of $2000 on any given day.[105] Like the Travel

> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or life.
>
> (b) As used in this section, (i) 'unlawful activity' means (1) any business enterprise involving gambling . . . .

18 U.S.C. § 1952 (2000 & Supp. 2002).

[99] Rodefer, *supra* note 95 (citing United States v. Campione, 942 F.2d 429, 434 (7th Cir. 1991)).

[100] *See* 18 U.S.C. § 1952(b).

[101] *See id.* § 1952(b)(i)(1).

[102] Rodefer, *supra* note 95 (citations omitted).

[103] Jeffrey Rodefer, *Illegal Gambling Business Act of 1970*, http://www.gambling-law-us.com/Federal-Laws/illegal-gambling.htm (last visited Feb. 26, 2005).

[104] *See* United States v. Lee, 173 F.3d 809, 810–11 (11th Cir. 1999).

[105] *See* GAO INTERNET GAMBLING REPORT, *supra* note 26, at 14. The Illegal Gambling Business Act provides, in pertinent part:

Act, the Illegal Gambling Business Act requires a predicate violation of state or local law.[106] In addition, the statute includes all individuals who participate in an online gambling business, however minor their role,[107] but does not target bettors for prosecution.[108] This reflects Congress' intent for the statute to target syndicated gambling operations, which are normally run by organized crime, as opposed to individuals.

d) The "Aiding and Abetting" Statute

Finally, the "aiding and abetting" statute provides that anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[109] This statute requires a showing that the defendant "willfully" associates himself with a criminal enterprise.[110] Because the DOJ contends that Internet gambling is an "offense against the United States," it reasons that media companies that willfully advertise for these online gambling

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

18 U.S.C. § 1955 (2000).

[106] Rodefer, *supra* note 103.

[107] United States v. Schullo, 363 F. Supp. 246, 249 (D. Minn. 1973), *aff'd*, 508 F.2d 1200 (8th Cir. 1975).

[108] *See id.* at 250.

[109] 18 U.S.C. § 2(a) (2000). Further, Subsection (b) provides: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle." *Id.* § 2(b).

[110] Lawrence G. Walters, *The Law of Online Gambling in the United States—A Safe Bet, or Risky Business?*, 7 GAMING L. REV. 445, 446 (2003).

websites are "aiding and abetting" criminal activity and may be punished just as the offshore website operators could be punished if they were within the jurisdiction of the United States courts.[111]

4. Existing Federal Gambling Advertising Statutes

In addition to the laws that criminalize illegal gambling operations, Congress has also enacted federal laws that restrict gambling advertising.[112] The reach of these statutes has been reduced over the past twenty years, both by Congress in its desire to encourage certain forms of gambling, and by the Supreme Court in its development of modern First Amendment commercial speech jurisprudence.[113] Nevertheless, these statutes are relevant to the Internet gambling advertising debate; particularly to the Supreme Court's treatment of gambling advertising under the First Amendment.

a) The Communications Act of 1934

The Communications Act of 1934[114] prohibits the radio or television broadcast of any advertisement of any "lottery, gift enterprise, or similar scheme" that offers prizes dependent upon lot or chance.[115] Courts have interpreted the Communications Act to prohibit the advertising of private casino gambling as well as information concerning lotteries.[116] When Congress passed the Communications Act in 1934, the federal government had a

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111 *See id.*

112 *See* Walters, *supra* note 8, at 111–12.

113 *See* discussion *infra* Part I.C.1–3.

114 48 Stat. 1088 (codified as amended at 18 U.S.C. § 1304 (2000)).

115 *See id.* The full text of § 1304 reads:

> 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.

Id.

116 *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 177 (1999); FCC v. Am. Broad. Co., 347 U.S. 284, 290–91 (1954).

uniform policy of discouraging gambling.[117] However, "federal statutes now accommodate both pro-gambling and antigambling segments of the national polity."[118]

The federal government's changing perception of gambling is reflected in the fact that Congress has significantly narrowed the scope of the Communications Act since 1934.[119] In 1975, Congress amended the Act to allow advertisements for state-conducted lotteries when "broadcast by a radio or television station licensed to a location in . . . a State which conducts such a lottery."[120] In 1988, Congress enacted two other statutes that further curbed the Communications Act's coverage.[121] First, the Indian Gaming Regulatory Act authorized Native American tribes to conduct various forms of gambling on Indian reservations in any state that allowed gambling for any purpose,[122] and exempted any gambling conducted pursuant to it from the broadcast restrictions of the Communications Act.[123] Second, the Charity Games Advertising Clarification Act of 1988 ("CGACA")[124] extended the Communications Act's exemptions for state-run lotteries to include any other lottery, gift enterprise, or similar scheme if it was not prohibited by the State in which it operated and was conducted by any governmental organization, not-for-profit organization, or commercial organization as a promotional activity "clearly occasional and ancillary to the primary business of that organization."[125] Hence, CGACA allows casinos run by state and local governments to broadcast gambling advertisements without penalty.[126]

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117 *See Greater New Orleans*, 527 U.S. at 177–78.

118 *Id.* at 180.

119 *See id.* at 178.

120 18 U.S.C. § 1307(a)(1)(B) (2000).

121 *See Greater New Orleans*, 527 U.S. at 178.

122 25 U.S.C. § 2710(d)(1)(B) (2000).

123 25 U.S.C. § 2720 (2000).

124 Pub. L. No. 100-625, 102 Stat. 3205 (codified as amended at 18 U.S.C. § 1307 (2000)).

125 18 U.S.C. § 1307(a)(2).

126 *See Greater New Orleans*, 527 U.S. at 179. Not-for-profit fishing contests are also exempted from the Communications Act. *See* 18 U.S.C. § 1305 (2000).

However, these curtailments of the Communications Act rendered it a discriminatory statute that favored state-run and Indian-run casino gambling at the expense of private operators. The DOJ and Federal Communications Commission ("FCC") acknowledged as much in a 1999 brief to the Third Circuit Court of Appeals, which stated that the FCC would no longer enforce the Communications Act broadcasting ban, even in states where casino gambling was illegal.[127] Thus, the federal government recognized that the Communications Act could no longer withstand First Amendment challenges in the context of land-based casino advertising.[128] The government, however, has made no such promise with regard to applying the Communications Act to Internet gambling advertising, and the First Amendment debate would be very different in this context because the federal government's treatment of online gambling has not been contradictory or discriminatory.[129]

b) The Direct Mail Statute

The Direct Mail statute is implicated whenever a gambling advertisement is sent through the mails.[130] This statute prohibits the "advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance,"[131] and empowers the postal service to prevent its violation by issuing "stop mail" orders.[132] The Direct Mail statute has been interpreted to prohibit the mailing of newspapers containing lottery advertisements.[133] This carries added significance because both the Post Office and the FCC interpret the term "lotteries" broadly to include virtually all forms of gambling, including casino

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[127] *See* Kathleen E. Burke, Comment, *Greater New Orleans Broadcast Association v. United States: Broadcasters Have Lady Luck, or at Least the First Amendment, on Their Side*, 35 NEW ENG. L. REV. 471, 500 (2001).

[128] *See id.*

[129] *See* discussion *infra* Part II.A.

[130] *See* 18 U.S.C. § 1302 (2000); *see also* Walters, *supra* note 8, at 116.

[131] 18 U.S.C. § 1302.

[132] *See* Walters, *supra* note 8, at 116.

[133] *See* Minn. Newspaper Ass'n v. Postmaster Gen. of United States, 677 F. Supp. 1400, 1406 (D. Minn. 1987), *vacated as moot*, 490 U.S. 225 (1989).

gambling.[134] Therefore, the Direct Mail statute prohibits most, if not all, print gambling advertisements.

The DOJ can attempt to utilize the Communications Act and the Direct Mail statute to restrict online gambling advertisements via the mediums of radio, television, or mail. The question remains, however, whether enforcing these statutes against Casino City and other similarly situated advertisers of Internet gambling services violates the First Amendment.

B. The First Amendment Commercial Speech Doctrine

The First Amendment of the United States Constitution forbids Congress from making any law "abridging the freedom of speech, or of the press."[135] Historically, the Supreme Court has interpreted the First Amendment to afford less protection to commercial speech than political or religious speech.[136] Such disparate treatment has been justified on the basis that commercial speech "is not essential to the maintenance of a legitimate, viable democracy and an informed, active public."[137] A further justification has been that commercial speech "is purportedly capable of objective truth, whereas political speech is ripe with alterative, subjective views. Thus, regulation of commercial speech does not prohibit the exchange of different views or endorse one view as truth over another as would regulation of political speech"[138] The Supreme Court used to be particularly unprotective of commercial speech when it sought to advertise for "vice" activities, such as gambling, alcohol, and cigarettes.[139] Over the past thirty years, however, the Supreme Court has rejected these exceptions for vice activities and bestowed an increasing amount of First Amendment protection upon all commercial speech.[140]

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134 *See* Walters, *supra* note 8, at 116.

135 U.S. CONST. amend. I.

136 Dana M. Shelton, *Greater New Orleans Broadcasting Association v. United States: The Fifth Circuit Upholds the Federal Ban on Casino Gambling Advertising against a First Amendment Challenge*, 70 TUL. L. REV. 1725, 1725 (1996).

137 *Id.* at 1726.

138 *Id.*

139 *See* discussion *infra* Part I.C.2.

140 *See* discussion *infra* Part I.C.3.

1. History of the Commercial Speech Doctrine

Until the 1970s, commercial speech was considered to be entirely outside the realm of First Amendment protection.[141] Indeed, in the 1942 case *Valentine v. Chrestensen*,[142] the Supreme Court set forth the early commercial speech doctrine that while government may not "unduly burden or proscribe" the freedom of communication of information or opinion, "the Constitution imposes no such restraint on government as respects purely commercial advertising."[143] However, in the landmark 1975 case *Bigelow v. Virginia*,[144] the Supreme Court rejected this longstanding principle and developed a doctrine that entitled non-misleading commercial messages to a degree of First Amendment protection.[145]

In *Bigelow*, a Virginia newspaper editor was convicted of violating a Virginia statute after his newspaper published an advertisement that described the legality and availability of abortions in New York.[146] The Supreme Court overturned the editor's conviction, holding that the statute, as applied, unconstitutionally infringed his First Amendment rights.[147] It announced that even "commercial advertising enjoys a degree of First Amendment protection,"[148] and that it was error to assume that commercial speech was "valueless in the marketplace of ideas."[149] The Court emphasized that the advertised activity contained a factual message of clear "public interest" to a diverse audience[150] and "pertained to constitutional interests."[151] In addition, the Court found it significant that the services advertised in the Virginia newspaper were legal in New York at the time,[152]

141 *See, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).
142 316 U.S. 52.
143 *Id*. at 54.
144 421 U.S. 809 (1975).
145 *Id.* at 818.
146 *Id.* at 811.
147 *Id.* at 829.
148 *Id.* at 821.
149 *Id.* at 826.
150 *Id.* at 822.
151 *Id.*
152 *Id.* at 822–23.

reasoning that the Virginia Legislature could not curtail the dissemination of information about services that were legal in another state over which Virginia had no regulatory authority.[153]

The following term, in the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[154] the Supreme Court expanded on *Bigelow* and held that speech that does "no more than propose a commercial transaction," such as an advertisement that lacked any political or social message, was entitled to First Amendment protection.[155] As such, a blanket ban on advertising the price of prescription drugs in Virginia violated the First Amendment.[156] The Court rejected the state's "highly paternalistic approach," reasoning "that people will perceive their own best interests if only they are well enough informed."[157]

Four years later, the Supreme Court assessed its commercial speech jurisprudence and set forth a framework to determine whether regulations that suppressed commercial speech were permissible under the First Amendment.[158] In the 1980 case *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[159] the Supreme Court crafted the following four-part test for evaluating commercial speech restrictions:

> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2]

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[153] *See id.* at 824. The Supreme Court stated:

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected . . . . It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that state.

Id.

[154] 425 U.S. 748 (1976).

[155] *Id.* at 762.

[156] *See id.* at 770.

[157] *Id.*

[158] *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[159] *Id.*

> Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[160]

A majority of the Supreme Court still utilizes the four-part *Central Hudson* framework today to evaluate commercial speech cases.[161]

In *Central Hudson*, the Supreme Court held that a New York regulation that banned advertising by electric utility companies was "more extensive than necessary" and violated the First Amendment.[162] The majority emphasized that "blanket bans" on commercial speech should be reviewed with "special care,"[163] since special concerns arise from "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy," which "could screen from public view the underlying governmental policy."[164] Hence, the Supreme Court dramatically altered the First Amendment landscape between 1975 and 1980 by

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[160] *Id.* at 566 (numbering added for clarity).

[161] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–55 (2001) ("But here, as in *Greater New Orleans*, we see 'no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.'"). Recently, certain judges and scholars have "advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for asserting the validity of governmental restrictions on commercial speech." Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999). Contemporary case law indicates that the Court itself is not completely content with the *Central Hudson* test and would prefer something stricter; for example, Justice Thomas has repeatedly called for the replacement of the *Central Hudson* test. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part). Nevertheless, the majority of the Court's current position is that although "reasonable judges may disagree about the merits" of repudiating the *Central Hudson* standard, it is:

> an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

Greater New Orleans, 517 U.S. at 184 (internal citations omitted).

[162] *See Cent. Hudson*, 447 U.S. at 572.

[163] *Id.* at 566 & n.9.

[164] *Id.*

extending First Amendment protection to purely commercial speech and crafting a framework to analyze commercial speech to determine if it warranted First Amendment protection.

2. The Paternalistic Approach: Early First Amendment Challenges to Gambling Advertising Restrictions

The gambling advertising restrictions embedded in the Communications Act and similar state statutes[165] have been subject to numerous First Amendment challenges over the past twenty years.[166] In the early cases, the Supreme Court took a deferential approach to the third and fourth prongs of the *Central Hudson* test, submitting to the government's interest in regulating commercial speech pertaining to "vice" activities like gambling.

The 1986 case *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*[167] was the first case in which the Supreme Court analyzed a gambling promotion restriction under the *Central Hudson* test, and provides a clear example of the Court's initial willingness to defer to "paternalistic" governmental interests in restricting gambling advertising.[168] In *Posadas*, the Supreme Court evaluated the constitutionality of a Puerto Rican statute that legalized certain forms of casino gambling in Puerto Rico in order to develop tourism but provided that "no gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico."[169]

The Supreme Court held that the Puerto Rico's commercial speech restriction was reasonable and permissible under the First Amendment.[170] In step one of the *Central Hudson* test, the Supreme Court concluded that the First Amendment was implicated because the advertisements would concern lawful activity and would not be misleading or fraudulent.[171] In step two,

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165 Walters, *supra* note 8, at 112; *see also supra* notes 112–129 and accompanying text.
166 *See infra* notes 167–238 and accompanying text.
167 478 U.S. 328 (1986).
168 *Id.* at 340–41.
169 *Id*. at 332 (citing Puerto Rico Games of Chance Act of 1948, P.R. Laws Ann. tit. 15, § 77 (1972)).
170 *Id.* at 348.
171 *Id.* at 340–41.

the Court found that Puerto Rico had a "substantial" interest in protecting its citizens from gambling's serious harmful effects on the public health, safety, and welfare.[172] In step three, the Court had no trouble concluding that the advertising restrictions "directly advanced" the government's asserted interest: the Puerto Rican Legislature had been reasonable in believing that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised."[173] Finally, in step four, the Court found that the broadcast regulations were not "more extensive than necessary" to serve the Puerto Rico's interests, given that Puerto Rico could have banned casino gambling altogether.[174]

The Court rejected the broadcasters' argument that in choosing to legalize casino gambling the Legislature was prohibited by the First Amendment from using advertising restrictions to reduce demand for such gambling.[175] Instead, the Court maintained that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[176] Therefore, the Court deferred to the Puerto Rico Legislature's decision that restricting advertising was the most effective way to reduce the demand for casino gambling.[177]

Seven years after *Posadas*, the Supreme Court entertained a challenge to the Communications Act and again permitted a gambling advertising prohibition by deferring to the paternalistic governmental interest in protecting the public.[178] In the 1993 case *United States v. Edge Broadcasting Co.*,[179] a radio station licensed in North Carolina, which was a non-lottery state, wished to

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[172] *Id.* at 341. The Court was concerned that Puerto Rican residents would have their "moral and cultural patterns" disrupted, crime and prostitution would increase, and organized crime rings would develop. *Id.*

[173] *Id.* at 341–42.

[174] *Id.* at 343–44; Walters, *supra* note 8, at 113.

[175] *Posadas*, 478 U.S. at 345–46.

[176] *Id.* The Court reasoned "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.* at 346.

[177] *See id.* at 344.

[178] *See generally* United States v. Edge Broad. Co., 509 U.S. 418 (1993).

[179] *Id.*

broadcast lottery advertisements to its listeners in the nearby state of Virginia.[180] The radio station sought a declaration that the CGACA, which exempts state-run casinos and certain other gambling schemes from the Communications Act, violated its First Amendment rights.[181]

In applying the four-factor *Central Hudson* test, the Supreme Court found that the Communications Act, as amended by the CGACA, regulated lawful activity and "directly advanced" the government's interest in supporting the anti-gambling laws of one state without unduly interfering with the pro-gambling laws of another state.[182] The Court also found the broadcast restrictions to be "reasonably fit" on the basis that the government's interest could not be achieved as effectively without the regulation.[183] Therefore, the Supreme Court upheld the Communications Act as applied to the North Carolina radio station, indicating that the Supreme Court's early review of the *Central Hudson* factors was concerned more with form than substance.[184]

3. The Modern Analytical Framework: Recent Challenges to Advertising Restrictions on Gambling and Other "Vice" Activities

The Supreme Court continues to utilize the *Central Hudson* framework. However, the means by which the Court evaluates each prong has evolved from a paternalistic approach that gave the government latitude to restrict advertising for "vice" activities[185] to an approach that gave more leeway to advertisers and allowed

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[180] *Id.* at 423–24.

[181] *Id.* at 424.

[182] *See id.* at 433–34. The Court reasoned that "allowing Edge Broadcasting to carry the lottery advertisements to North Carolina residents would be in derogation of the federal interest supporting the state's anti-lottery laws and would permit Virginia's lottery laws to dictate what stations a neighboring state may air." Walters, *supra* note 8, at 113; *see also Edge Broad.*, 509 U.S. at 434.

[183] *Edge Broad.*, 509 U.S. at 429–30.

[184] *See id.* at 435; Burke, *supra* note 127, at 493–94.

[185] *See, e.g.*, Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 336 (1986) (noting that the Court was concerned with the citizens of Puerto Rico being subject to, and "invited" to participate in, the gambling which was being advertised to tourists).

more information to be disseminated to the public.[186] In fact, in the same year the Supreme Court decided the deferential *Edge Broadcasting* case, the Court began to alter its *Central Hudson* analysis by putting an increasingly high burden on the government to justify its bans on commercial speech.[187]

In the 1993 case *Edenfield v. Fane*,[188] the Supreme Court toughened its analysis of *Central Hudson*'s third factor.[189] The Court announced that the government would carry the burden of showing that the challenged regulation advanced the government's interest "in a direct and material way."[190] Furthermore, this burden cannot be "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."[191] The *Edenfield* Court emphasized that this requirement was critical to prevent a state from easily restricting commercial speech "in the service of other objectives that could not themselves justify a burden on commercial expression."[192]

Two years later, in *Rubin v. Coors Brewing Co.*,[193] the Supreme Court departed further from its deferential approach as it increased the government's burden in steps three and four of the *Central Hudson* analysis and held that speech restrictions would be invalid in cases where the government's actions were irrational,

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[186] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 590 (2001) (noting that while the State of Massachusetts might have justified concerns for wanting to restrict cigarette ads, the ads are nonetheless afforded First Amendment protection because otherwise the government's ability to restrict activities that it characterized as a "vice activity" would be "limitless"); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 191 (1999) ("Even putting aside the broadcast exemptions for arguably distinguishable sorts of gambling that might also give rise to social costs about which the Federal Government is concerned . . . the Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos.").

[187] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761 (1993).

[188] *Id.*

[189] *See id.* at 767.

[190] *Id.*

[191] *Id.* at 770–71.

[192] *Id.* at 771.

[193] 514 U.S. 476 (1995).

contradictory, or not supported by substantial evidence.[194] In *Rubin*, the Court struck down a federal law that prohibited displaying alcohol content on beer labels.[195] The Court first stated that neither "*Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard" for vice activities.[196] The Court then concluded that under the stricter step three standard developed in *Edenfield*, the labeling restriction did not "directly and materially" advance the government's asserted interest in discouraging "strength wars" between brewers because of the "overall irrationality of the Government's regulatory scheme."[197] The scheme was irrational because it did not prohibit the disclosure of alcohol content in *advertising*, and was not based on any convincing evidence that the labeling ban actually inhibited "strength wars."[198] The Court also found that the speech regulation failed step four of the *Central Hudson* test because the government had less intrusive alternatives available.[199] Thus, *Rubin* marked a departure from the Court's prior analysis by requiring more than "anecdotal evidence and educated guesses" for the government's commercial speech restrictions to pass steps three and four of the *Central Hudson* test.[200]

The following year, building upon the *Edenfield* and *Rubin* decisions, the Supreme Court significantly changed the way gambling advertising challenges were analyzed, casting doubt on the prior reasoning in *Posadas* and *Edge*.[201] In *44 Liquormart, Inc. v. Rhode Island*,[202] the Court heard an appeal by Rhode Island alcohol retailers who sought a declaratory judgment that two Rhode Island laws prohibiting alcohol price advertisements violated the First Amendment.[203] The parties stipulated that the

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194 *See id.* at 488.
195 *See id.* at 491.
196 *Id.*
197 *Id.* at 488.
198 *Id.*
199 *Id.* at 491.
200 *Id.*; *see also* Burke, *supra* note 127, at 494.
201 *See* Walters, *supra* note 8, at 113.
202 517 U.S. 484 (1996).
203 *Id.* at 493. The Court noted that the regulations had to be reviewed with "special care" because they constituted "blanket bans" on truthful, non-misleading commercial speech. *Id.* at 504 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,

proposed advertisements did not concern illegal activity and would not be false or misleading.[204] Under step two of the *Central Hudson* analysis, the Court expressed skepticism, but accepted as "substantial" Rhode Island's proffered interests in promoting temperance.[205] In the third step, the Court noted that because the regulation constituted a blanket ban, Rhode Island was required to show that "the price advertising ban will *significantly* reduce alcohol consumption."[206] The State failed this test because the evidence it provided merely "suggest[ed] that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers."[207] Similarly, in the fourth step, the State did not prove that its speech neglected to "establish a 'reasonable fit' between its abridgement of speech and its temperance goal."[208]

In addition, the Court acknowledged that "*Posadas* erroneously performed the First Amendment analysis"[209] and announced:

> [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. As we explained in *Virginia Bd. of Pharmacy*, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[210]

Thus, the Court rejected the "legislative judgment" leniency endorsed by the *Posadas* majority.[211] The Court also discarded

447 U.S. 557, 566 n.9 (1980)). Following its reasoning in *Central Hudson*, the Court explained that blanket bans "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. . . . [and] [t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.* at 503 (internal citation omitted).

[204] *Id.* at 493.

[205] *Id.* at 504.

[206] *Id.* at 505.

[207] *Id.* at 506.

[208] *Id.* at 507 (internal citation omitted).

[209] *Id.* at 509.

[210] *Id.* at 510 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976)).

[211] *Id.* at 508, 510.

Posadas' theory that the power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.[212] Finally, the Court rejected Rhode Island's contention that the price advertising ban should be upheld because it targeted commercial speech pertaining to a "vice" activity.[213] Therefore, in *44 Liquormart*, the Supreme Court abandoned the broad legislative discretion it once had tolerated, holding that the Rhode Island statutes failed the *Central Hudson* test and violated the First Amendment.[214]

Under this framework, the Supreme Court readdressed the constitutionality of the Communications Act in the 1999 case *Greater New Orleans Broadcasting Ass'n v. U.S.*,[215] and held that the statute's numerous exceptions rendered it unconstitutional as applied to private casino gambling advertisements in states where such gambling was legal.[216] In this case, an association of New Orleans-area broadcasters that operated FCC-licensed radio and television stations filed suit against the United States and the FCC for a declaration that the Communications Act and FCC's implementing regulation, which prohibited broadcasters from carrying advertisements about privately-operated commercial casinos regardless of the location of the station or casino, violated the First Amendment.[217]

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[212] *Id.* at 510–13. The Court stated that it was now "quite clear that banning speech may sometimes prove far more intrusive than banning conduct." *Id.* at 511.

[213] *Id.* at 513. Noting that it has rejected this argument the previous year in *Rubin*, the Court reiterated its fear that the scope of any "vice" exception would allow state legislatures to justify censorship by simply putting a "vice" label on selected activities or requiring courts "to establish a federal common law of vice." *Id.* at 514.

[214] *Id.* at 516. The following year, the Ninth Circuit Court of Appeals and the U.S. District Court for New Jersey both considered challenges to gambling broadcasting regulations under the Communications Act, and utilized the Supreme Court's *44 Liquormart* rationale to depart from earlier interpretations of this federal broadcast ban. *See* Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997); Players Int'l v. United States, 988 F. Supp 497 (D.N.J. 1997).

[215] 527 U.S. 173 (1999).

[216] *See id.* at 176, 190.

[217] *See id.* at 180–81. The broadcasters wished to broadcast advertisements for private casinos that were lawful in Louisiana and neighboring Mississippi, but feared sanctions because "signals from Louisiana broadcasting stations [could sometimes] be heard in neighboring states, including Texas and Arkansas, where private casino gambling [was] unlawful." *Id.*

The parties stipulated that the advertisements would satisfy the first step of the *Central Hudson* test.[218] Under step two, the government identified its interests as: reducing the social costs associated with gambling, such as compulsive gambling; stopping organized crime, narcotics trafficking, and other illegal conduct; and assisting those states that wish to restrict gambling or prohibit casino gambling within their borders.[219] The Court accepted the government's interest as "substantial."[220] However, it noted that this conclusion was "by no means self-evident,"[221] given that "the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits."[222] The Court pointed out that "[d]espite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes . . . but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities."[223]

After voicing its reservations about the government's interest, the Supreme Court analyzed the broadcast restrictions under the third and forth prongs of the *Central Hudson* test and held that as applied to the broadcasters' case, the Communications Act violated the First Amendment.[224] Regarding step three, the Court stated that the "operation of [the Communications Act] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."[225] In step four, the Court found that the regulations were more extensive than necessary, noting that there "surely are practical and nonspeech-related forms of regulation . . . that could more directly and effectively alleviate some of the social costs of casino gambling."[226] The Court explained that if the federal government

[218] *See id.* at 184.
[219] *See id.* at 185.
[220] *Id.* at 186.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 186–87.
[224] *See id.* at 188–96.
[225] *Id.* (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (1995)).
[226] *Id.* at 192.

had "adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case."[227] Finally, the Court pronounced that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.[228] . . . It is well settled that the First Amendment mandates closer scrutiny of governmental restrictions on speech than of its regulation of commerce alone."[229] Due to the contradictory nature of the government's proffered interests and regulations, *Greater New Orleans* further expanded the First Amendment protections for gambling advertisements by rendering the Communications Act unenforceable against casino gambling advertisements in any state where casino gambling was legal.[230]

Finally, the 2001 case *Lorillard Tobacco Co. v. Reilly*[231] demonstrates the strict scrutiny with which the Supreme Court now analyzes the third and fourth prongs of the *Central Hudson* test.[232] In this case, a group of tobacco manufacturers and retailers challenged regulations promulgated by the Massachusetts Attorney General regarding "the advertisement and sale of cigarettes, smokeless tobacco, and cigars."[233] The first regulation at issue prohibited outdoor advertisements for smokeless tobacco and cigars within one thousand feet of a school or playground.[234] The Supreme Court found that this regulation satisfied step three of the *Central Hudson* test because the State had presented sufficient evidence of a link between smokeless tobacco and cigar advertising and demand.[235] Under step four, however, the Supreme Court found that the regulation was more extensive than necessary to advance the state's interest.[236] The "breadth and

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[227] *Id.* at 195 (internal citation omitted).
[228] *Id.* at 193 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509–11 (1996)).
[229] *Id.* (citing Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
[230] *See id.* at 195–96.
[231] 533 U.S. 525 (2001).
[232] *See generally id.*
[233] *See id.* at 532.
[234] *See id.* at 536.
[235] *Id.* at 561 (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).
[236] *See id*. ("[T]he 'critical inquiry in this case,' requires a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations do not meet this standard.") (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of

scope of the regulations," which would have prevented all advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts, were too pervasive to be considered narrowly tailored.[237] Further, the "process by which the Attorney General [had] adopted the regulations d[id] not demonstrate a careful calculation of the speech interests involved."[238]

In sum, the Supreme Court's treatment of commercial speech has undergone an enormous transformation over the past thirty years. Until the 1970s, commercial speech was afforded no First Amendment protection.[239] Since *Bigelow* was decided in 1975, however, the Supreme Court has applied increasingly strict scrutiny to governmental attempts to restrict advertising, even for "vice" activities like gambling.[240] For a gambling advertising prohibition to survive a First Amendment challenge today, the government must either demonstrate that the specific form of gambling is illegal under federal or state law, or prove through substantial evidence that the government's interest is "substantial," that the regulation "directly and materially" advances the asserted

N.Y., 447 U.S. 557, 569 (1980)). The Court reiterated that step four requires a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." *Id.* at 556 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)).

[237] *Id.* at 561–62.

[238] *Id.* at 562. The second Massachusetts regulation at issue was a blanket point-of-sale advertising restriction that required indoor advertisements to be placed no lower than five feet from the floor. *Id.* at 566. The Court held this regulation failed both the third and fourth prongs of the *Central Hudson* test because it did not reasonably fit with Massachusetts' goal of curbing the demand of tobacco products and preventing minors from using them. *Id.* The Court noted that "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id*. The third regulation barred self-service displays for tobacco. The Court held this restriction did withstand First Amendment scrutiny because it was narrowly tailored to prevent access to tobacco products by minors. *Id.* at 569–70.

[239] David L. Hudson, Jr., *Bates Participants Reflect on Landmark Case*, *at* http://www.firstamendmentcenter.org/analysis.aspx?id=14394 (Nov. 18, 2004) ([F]or the vast majority of the 20th century advertising was not entitled to First Amendment protection at all. In its 1942 decision *Valentine v. Chrestensen* the U.S. Supreme Court wrote: 'We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.' It wasn't until the mid-1970s that the U.S. Supreme Court granted commercial speech a degree of First Amendment protection.).

[240] *See* Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975).

governmental interest, and that there is a "reasonable fit" between the restriction and the asserted interest that demonstrates a careful calculation of the speech interests involved.[241] The Supreme Court has not yet had an opportunity to apply these standards to Internet gambling advertisements. However, the District Court for the Eastern District of Louisiana will soon have the occasion to decide whether the DOJ's Internet gambling advertising restrictions satisfy the current *Central Hudson* standards, or whether Casino City is correct that the DOJ cannot overcome this threshold.[242]

II. CASINO CITY VERSUS THE DOJ: THE LEGAL BATTLEGROUND

As discussed in Part I, the United States government contends that Internet gambling is illegal under federal law, and that, as a result, the advertising of gambling websites is not protected by the First Amendment and constitutes "aiding and abetting" illegal activity.[243] Conversely, Casino City argues Internet gambling is legal, and, thus, it has a First Amendment right to advertise online casinos and sportsbooks.[244] As such, the first issue in this controversy is whether Internet gambling is illegal activity under federal law. The second issue is whether Internet gambling advertising is protected by the First Amendment. If Internet gambling is illegal under the Wire Act or other federal laws, advertisements for this activity will fail the first step of the *Central Hudson* analysis and will not be protected by the First Amendment.[245] But, if federal law cannot be interpreted to outlaw Internet gambling, Casino City will prevail unless the DOJ can satisfy the increasingly strict second, third, and fourth prongs of the *Central Hudson* test.[246]

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

242 *See supra* notes 12–21 and accompanying text.

243 *See supra* note 27 and accompanying text.

244 *See supra* note 11 and accompanying text.

245 *Cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564–66 (1980) ("[T]he restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

246 *Id.* at 566; *see supra* Part I.B.3 (discussing the Court's increasing strictness in applying the *Central Hudson* test).

A. The DOJ's Case for Prohibiting Online Casino Advertising

In its June 2003 letter, the DOJ advised the National Association of Broadcasters and other media groups that anyone who placed advertisements for offshore sportsbooks or online casinos could be violating various federal and state laws, including the Wire Act, the Travel Act, and the Illegal Gambling Business Act.[247] Further, the DOJ warned that these advertisers may be subject to prosecution for aiding and abetting illegal activities, pursuant to the federal "aiding and abetting" statute.[248] In its October 29, 2004 motion to dismiss Casino City's complaint, the DOJ proffered two main arguments in support of its position. First, the DOJ's actions did not violate the First Amendment because it addressed only the advertising of "unlawful" activity.[249] Therefore, "Casino City's claim fails as a matter of law, for it is well-established that there is no First Amendment right to advertise illegal activity."[250] Second, the DOJ's actions satisfied the remaining elements of the *Central Hudson* test, "which . . . are implicated only if the challenged restrictions regulate speech that is not misleading and does not concern unlawful activity."[251] The DOJ argues that Internet and offshore gambling operations are "particularly pernicious because they can be accessed so easily by anyone in the country, including particularly vulnerable populations such as children and compulsive gamblers . . . and also due to the potential for fraud and money laundering."[252] Therefore, the DOJ maintains that the challenged commercial speech restrictions would be valid even if Internet gambling was legal.[253]

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247 *Casino City First Amendment Complaint Overview*, *supra* note 9.

248 *Id.*

249 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 18-19, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

250 *Id.* at 17 (citing *Cent. Hudson*, 447 U.S. at 563–64).

251 *Id.* at 19. The government also argued that Casino City had no standing to bring the case, but this argument is not considered in this Note. *See id.* at 7–15.

252 *Id.* at 21.

253 *See id*. at 20–21.

1. Internet Gambling is Illegal under Federal Law

The crux of the federal government's argument is that "the First Amendment does not protect commercial speech related to illegal activity."[254] Indeed, in its motion to dismiss, the DOJ stated that, by definition, "the only speech at issue that the letter [to the National Association of Broadcasters] identifies as even potentially subject to criminal liability is speech that is advertising illegal activity."[255] The DOJ contends that Internet gambling is illegal under the Wire Act, the Travel Act, and the Illegal Gambling Business Act.[256]

a) The Wire Act Outlaws Internet Gambling

The DOJ relies primarily on the Wire Act to support its contention that Internet gambling is illegal under federal law.[257] The Wire Act expressly outlaws gambling over the "wires," as opposed to merely facilitating the enforcement of existing state or local gambling laws. Although Congress promulgated the Wire Act before the Internet existed, the federal government argues that "if an Internet gaming Web site operating in any country (including the United States) receives a bet transmitted by an individual located in the United States, the operator has violated the Wire Act. For this reason, foreign entities offering gambling to U.S. citizens through the Internet would be subject to the Wire Act."[258]

The federal government's broad interpretation of the Wire Act is supported by the Second Circuit Court of Appeals. In *United States v. Cohen*,[259] the Second Circuit's analysis of the Wire Act gave the DOJ a mechanism to "harness a sector of the to-date illusive Internet gambling business."[260] In this case, Jay Cohen

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254 *Id.* at 18.

255 *Id.* at 19.

256 *See supra* notes 80–82 and accompanying text.

257 *See, e.g.*, Memorandum of Law in Support of Defendant's Motion to Dismiss at 3, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

258 GAO INTERNET GAMBLING REPORT, *supra* note 26, at 12.

259 260 F.3d 68 (2d Cir. 2001).

260 McGinty, *supra* note 85, at 207.

was prosecuted for operating an Internet bookmaking operation in Antigua called the World Sports Exchange ("WSE"), which customers would contact via the Internet or telephone to place bets.[261] A jury convicted Cohen for conspiracy and substantial offenses in violation of the Wire Act,[262] and the Second Circuit upheld his conviction[263] holding that that WSE had engaged in transmission of bets that were illegal under the Wire Act.[264]

First, the court rejected Cohen's argument that the safe harbor provision of the Wire Act applied to this case. The court reasoned, "[b]etting is illegal in New York, and thus the safe-harbor provision in § 1084(b) cannot apply in Cohen's case as a matter of law."[265] Next, the court analyzed Cohen's argument that the transmissions between his system and customers were limited to information that enabled customers to place bets entirely from their accounts in Antigua, where such betting was legal.[266] The court noted that the Wire Act prohibited the transmission of *information* assisting in the placing of bets as well as the transmission of bets themselves.[267] Since Internet betting was illegal in New York, Cohen could not have benefited from the safe harbor even if WSE had only transmitted betting *information* as opposed to actual bets.[268]

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[261] *Cohen*, 260 F.3d at 70.

[262] *Id.* at 71. At Cohen's trial, the judge gave the jury the following instruction:

> If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmissions only starting with an employee in an internet mechanism located on the premises in the foreign country.

Id. at 74–75.

[263] *See id.* at 78.

[264] *See id.* at 75–76. The Supreme Court denied Cohen's petition for writ of certiorari. *Cohen*, 260 F.3d 68 (2d Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

[265] *Id.* at 74.

[266] *See id.* at 74–75.

[267] *See id.* at 75 (emphasis added).

[268] *See id*. (emphasis added).

The Second Circuit "took a strong stand against Internet gambling" in *Cohen*,[269] putting "all offshore Internet gambling businesses . . . on notice that they may be criminally liable if they accept bets transmitted from within the U.S."[270] In addition, at least two other courts have indicated that offshore Internet casinos that accept bets from United States customers violate the Wire Act. In *United States v. Kaczowski*,[271] the Western District of New York court found that an online gambling operation had potentially violated the Wire Act, Travel Act, and various New York state laws prohibiting the promotion of gambling.[272] Further, in *People ex rel. Vacco v. World Interactive Gaming Corp.*,[273] a New York state court prohibited the continued operation of an Antiguan online gambling company it found to have violated the Wire Act and other federal gambling and securities laws.[274] Based on this precedent and the plain meaning of the statute, the DOJ argues that gambling via online sportsbooks and casinos is illegal under the Wire Act.[275]

b) The Travel Act and Illegal Gambling Business Act Outlaw Internet Gambling

In addition to the Wire Act, the DOJ also cites the Travel Act[276] and the Illegal Gambling Business Act[277] in support of its position that Internet gambling is illegal under federal law. The federal government contends that these are "[t]he two other federal

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269 Manter, *supra* note 6, at 12.

270 *Id*. at 14. According to one legal analyst:

> If the analysis in the Cohen case is accepted by other courts, it could spell the death knell for participation in the online gaming industry in the United States, absent legislation approving it. Even affiliate promotion of [online] casino websites under the court's reasoning could result in criminal sanctions against the unsuspecting webmaster. Although the First Amendment is implicated by any attempt to regulate truthful speech about a legal product or service, the concerns created by this court decision are real.

Walters, *supra* note 110, at 447.

271 114 F. Supp. 2d 143 (W.D.N.Y. 1999).

272 *Id.* at 151–55.

273 714 N.Y.S.2d 844 (Sup. Ct. 1999).

274 *Id.* at 861–63.

275 *See supra* note 86 and accompanying text.

276 18 U.S.C. § 1952 (2000 & Supp. 2002).

277 *See* 18 U.S.C. § 1955 (2000).

statutes with direct applicability to Internet gambling."[278] The government states that "gambling over the Internet generally would violate the Travel Act because an interstate facility, the Internet, is used to conduct gambling" with American consumers.[279] However, a conviction under the Travel Act requires a predicate violation of either a state or federal law,[280] so it merely provides remedies and enforcement power for other existing laws, as opposed to making any form of gambling illegal on its face.[281] The same is true for the Illegal Gambling Business Act.[282] Due to this inherent limitation, the DOJ has not relied heavily on these statutes.[283] In its motion to dismiss Casino City's complaint, the DOJ did not offer any justification as to why it believed Internet gambling was illegal under the Travel Act or the Illegal Gambling Business Act.[284]

2. Internet Gambling Advertisers are "Aiding and Abetting" Illegal Activity

As a result of its belief that online gambling is illegal, the Justice Department argues that American companies that advertise gambling websites are "aiding and abetting" illegal activity,[285] and can be prosecuted for violating federal law under the "aiding and abetting" statute.[286] This statute requires a showing that the defendant willfully associated itself with a criminal enterprise.[287] The courts have not clarified how far from the actual placing of bets a company must be to avoid a charge of aiding and abetting or conspiracy to violate gambling laws.[288] However, the DOJ is

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278 GAO INTERNET GAMBLING REPORT, *supra* note 26, at 13.

279 *Id.* at 14.

280 Rodefer, *supra* note 95 (citing 18 U.S.C. § 1952).

281 *See generally id.*

282 Rodefer, *supra* note 103.

283 *See, e.g.*, Memorandum of Law in Support of Defendant's Motion to Dismiss, *passim*, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

284 *See id.*

285 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 19, *Casino City* (No. 04-557-B-M3).

286 *See* 18 U.S.C. § 2 (2000); *see also* discussion *supra* Part I.A.3.e.

287 Walters, *supra* note 110, at 446.

288 *See id.* at 447.

attempting to prosecute Internet gambling advertisers under the "aiding and abetting" statute on the theory that there is a direct link between the advertisements and online gambling websites, in that offshore gambling websites would be unable to reach American consumers without advertising.[289]

3. Internet Gambling Advertising Restrictions Satisfy the *Central Hudson* Test

In its motion to dismiss Casino City's complaint, the Justice Department maintains that it could constitutionally prohibit Internet gambling advertising even if the underlying activity were legal.[290] The basis of this contention is that an online gambling advertising prohibition would "readily satisf[y] the remaining three elements of the *Central Hudson* test, which are implicated only by restrictions on speech that is not misleading and does not relate to unlawful activity."[291]

The DOJ argues that its actions satisfy step two of the *Central Hudson* test because it has a "substantial interest in the enforcement of its criminal laws, and more specifically, in reducing aid to illegal gambling operations."[292] The government cites the cases of *Edge Broadcasting*,[293] *Greater New Orleans*,[294] and *Posadas*[295] as proof that "the Supreme Court has specifically noted that the government has a substantial interest in reducing gambling by regulating gambling advertising."[296] In addition, the DOJ states that "whatever the federal government's interest in reducing legal gambling activity, there is no basis for contending that the government lacks a substantial intent in enforcing laws proscribing *illegal* gambling."[297]

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289 *See* Walters, *supra* note 8, at 116.

290 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 19–22, *Casino City* (No. 04-557-B-M3).

291 *Id.* at 17.

292 *Id.* at 19–20.

293 United States v. Edge Broad. Co., 509 U.S. 418 (1993).

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

295 Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986).

296 Reply Brief in Support of Defendant's Motion to Dismiss at 12, *Casino City* (No. 04-557-B-M3) (emphasis added).

297 *Id.* (emphasis added).

The government points to the dangerous nature of online gambling to further substantiate its interest in preventing online gambling advertising.[298] In its motion to dismiss, the DOJ argues that Internet and offshore sportsbook gambling operations are "particularly pernicious because they can be accessed so easily by anyone in the country, including particularly vulnerable populations such as children and compulsive gamblers, via a computer or telephone, and also due to the potential for fraud and money laundering."[299] Because these issues make Internet gambling different from, and arguably more dangerous than, traditional casino gambling, "[e]ven persons who endorse traditional gambling may have concerns about the unique nature of Internet gambling."[300]

The DOJ's interest in defending the country against money laundering by terrorists and organized crime gained prominence after September 11, 2001.[301] United States Representative James Leach (R-Iowa) introduced an online gambling prohibition into the early drafts of the USA PATRIOT ACT ("Patriot Act"),[302] arguing that "Internet gambling provided a forum for terrorists to launder money."[303] The House Financial Services Committee, Justice Department, and Federal Bureau of Investigation ("FBI") all lobbied in support of this bill,[304] and House and Senate negotiators agreed to include it in the Patriot Act.[305] However, other legislators opposed the bill, contending that the connection

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[298] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21, *Casino City* (No. 04-557-B-M3).

[299] *Id.* Indeed, the policy reasons most often cited in support of an Internet gambling prohibition are the risk of money laundering by terrorists and organized crime, the risk of fraud due to the difficulty to regulate the Internet, the potential increase in gambling addictions, and the inability to control adolescent access. *See* Manter, *supra* note 6, ¶ 5; McGinty, *supra* note 85, at 206.

[300] McGinty, *supra* note 85, at 206.

[301] *See* Manter, *supra* note 6, ¶ 5; *see also supra* notes 73–77 and accompanying text.

[302] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272.

[303] Manter, *supra* note 6, ¶ 5.

[304] *See* Mark D. Schopper, Comment, *Internet Gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme*, 5 CHAP. L. REV. 303, 309 (2002).

[305] *See id.*

between Internet gambling and terrorism was too weak to warrant including this provision in the broader money-laundering legislation.[306] The measure was ultimately dropped from the final draft of the Patriot Act due to a lack of evidence supporting such a connection.[307] Nevertheless, many government officials continue to believe that terrorist cells and other dangerous groups are utilizing gambling websites to launder the proceeds of their illegal operations.[308] And as discussed in Part I, members of Congress are still trying to promulgate similar legislation to prohibit Internet gambling.[309]

The government's second proffered interest is protecting Americans from fraud. Internet gambling raises legitimate concerns about consumer fraud that do not apply to land-based gambling.[310] Casinos operating outside the United States cannot be regulated by federal or state governments to prevent fraud, and could escape penalties imposed upon them by American laws and courts.[311] As a result, online gamblers could have difficulty receiving their winnings, and could not be certain that the online casino was operating its games "fairly and with the same degree of chance as land-based games."[312] Conversely, if Internet gambling websites were licensed within the United States, regulations could be established to prevent fraud.[313] For example, payouts could be audited to ensure they were fair, and software codes could be checked to ensure that games of chance were not rigged.[314]

Third, the DOJ and other proponents of anti-Internet gambling legislation argue that Internet gambling amplifies the issue of "problem gaming."[315] While "brick-and-mortar gambling establishments [have established] safeguards against gambling addiction and underage gambling[, Internet] gamblers remain

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306 *Id.* at 310.
307 Manter, *supra* note 6, ¶ 5.
308 *See generally* discussion *supra* Part I.A.2.
309 *See* discussion *supra* Part I.A.2.
310 *See* Lang, *supra* note 26, at 548–49.
311 *See id.* at 549.
312 *Id.* at 548.
313 *See id.*
314 *Id.*
315 Manter, *supra* note 6, ¶ 6.

anonymous and often use credit cards when placing bets."[316] Also, "there is no 'tangible representation of money' such as betting chips for users to visualize how much they have won or lost."[317] As a result, "[a]ddicted players [could] lose a life savings or create thousands of dollars of debt without leaving their home[s]."[318] The anonymous nature of Internet gambling also enables underage adolescents to bet online, since it is impossible to verify a player's age.[319]

The Justice Department contends that its crackdown on Internet gambling advertising also satisfies the third and fourth steps of the *Central Hudson* analysis.[320] Given that "Internet and offshore gambling operations pose a unique threat of vastly increasing the pervasiveness and easy accessibility of various types of gambling,"[321] the DOJ reasons:

> By punishing and deterring advertising for such operations, the challenged application "directly advance[s]" the goal of the statute by reducing the ability of such operations to solicit customers. There is more than a "reasonable fit" between this goal and the method of advancing it that plaintiff challenges in this case. In fact, this application could not be any more narrowly tailored because it only prohibits the advertising of illegal activities, and only when such conduct violates the prohibitions of 18 U.S.C. § 2.[322]

Furthermore, "the connection between advertising an activity and increased incidence of the activity is the very reason that Internet gambling businesses pay Casino City money to advertise for them, and indeed, it is the foundation upon which the entire

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316 *Id.*

317 Lang, *supra* note 26, at 550 (citing Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413, 419 (2000)).

318 Manter, *supra* note 6, ¶ 6.

319 *See* Lang, *supra* note 26, at 547.

320 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 19, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

321 *Id.* at 22.

322 *Id.*

advertising industry rests."[323] Thus, even if Internet gambling were legal under federal law, the challenged advertising restrictions are narrowly tailored and no more restrictive than necessary given the unique and serious threat to American interests posed by online gambling.[324]

In sum, the federal government contends that Internet gambling is illegal under federal law and that its actions satisfy the *Central Hudson* requirements for regulating commercial speech.[325] The DOJ's legality argument rests on its contention that online gambling is illegal under the Wire Act, the Travel Act, and the Illegal Gambling Business Act, and that there is no First Amendment right to advertise illegal activity.[326] Under step two of the *Central Hudson* test, the DOJ argues that it has a substantial interest in enforcing its criminal laws and protecting against money laundering, consumer fraud, gambling addiction, and adolescent gambling.[327] The government also argues that its actions also satisfy the third and fourth prongs of the *Central Hudson* analysis because they are narrowly tailored and no more restrictive than necessary.[328] In contrast, Casino City asserts that online gambling is legal under federal law and that the First Amendment protects its advertising.

B. Casino City's Case that the DOJ's Ban on Internet Casino Advertising Violates the First Amendment

In its complaint against the Department of Justice, Casino City contended that the DOJ's application of the Wire Act, Travel Act, Illegal Gambling Business Act, and "aiding and abetting" statute against it and other similarly situated entities would constitute a

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[323] Reply Brief in Support of Defendant's Motion to Dismiss at 13, *Casino City* (No. 04-557-B-M3).

[324] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21–22, *Casino City* (No. 04-557-B-M3).

[325] *See id.* at 2–3; Reply Brief in Support of Defendant's Motion to Dismiss at 1–2, *Casino City* (No. 04-557-B-M3).

[326] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 18–19, *Casino City* (No. 04-557-B-M3).

[327] *See id.* at 19–20.

[328] *See id.* at 22.

violation of their First Amendment rights because Internet gambling is a lawful activity.[329] As such:

(a) The United States does not have a substantial interest sufficient to justify the imposition upon the exercise of free expression resulting from such application and the threat of such application; (b) [t]he threatened application would not effectively serve any purported governmental interest; and (c) [t]he application was not narrowly drawn to effectuate any purported government interest.[330]

Furthermore, in its response to the DOJ's motion to dismiss, Casino City argued that "the Internet creates a new challenge for the U.S. Supreme Court in relation to the First Amendment."[331] Because advertisements placed on Casino City websites are accessible "anywhere in the world" through the Internet, "including places where the advertised activities are expressly legal and places where the advertised activities might be prohibited,"[332] the "DOJ cannot assert that advertisements placed by Casino City concern per se illegal conduct, unprotected by the First Amendment."[333]

1. Internet Gambling is Lawful Activity

On Casino City's website, CEO Michael Corfman asserts that the "public has the right to see the wealth of information we provide on casinos and sportsbooks, and we have the First Amendment right to advertise online gaming on the web to support its free publication."[334] In its complaint, Casino City contends that the application of the Wire Act, Travel Act, Illegal Gambling Business Act, and "aiding and abetting" statute against it and others similarly situated violates the First Amendment.[335] Underlying this argument is Casino City's belief that its

[329] *See* Complaint at 2, 4–5, *Casino City* (No. 04-557-B-M3).
[330] *Id.* at 3.
[331] Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 20, *Casino City* (No. 04-557-B-M3).
[332] *Id.* at 18–19.
[333] *Id.* at 21.
[334] *Casino City First Amendment Complaint Overview*, *supra* note 9.
[335] *See* Complaint at 3–4, *Casino City* (No. 04-557-B-M3).

advertisements satisfy the first step of the *Central Hudson* test: they are about lawful activities and are not misleading.[336] Adjunct to this argument is Casino City's theory that gambling activity advertised *via the Internet* should not be deemed illegal under step one of the *Central Hudson* test if it is legal anywhere in the world, regardless of Internet gambling's legality in the United States, since Internet advertisements are accessible "by persons located around the world where online sportsbooks and online casinos are not illegal."[337]

a) The Wire Act Does Not Outlaw Internet Gambling

Casino City contests the DOJ's position that the Wire Act prohibits Internet gambling.[338] Although the Second Circuit's decision in *United States v. Cohen*[339] supports the DOJ's position,[340] this decision is by no means fatal to Casino City's case. First, the Second Circuit decision involved a *sports* betting website, and was silent on the legality of online casinos, for which Casino City also advertises.[341] Second, at least one legal commentator has argued that the *Cohen* opinion was not forceful enough to have a significant effect on the legal landscape because the Second Circuit did not "use strong language in reference to Cohen's Internet use or language to more justly include Internet use within the scope of the [Wire Act]."[342] Had the court done so, it "could have added incentive and a reasonable precedent for future courts to make a gradual move toward defining the terms of the [Wire Act] to include Internet gambling transactions. . . . ultimately making the [Wire Act] an effective avenue to convict online sports wagering."[343]

Most importantly, the Second Circuit's decision is not binding on the other circuits, and the only other circuit court to have

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336 *See id.*

337 Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 22, *Casino City* (No. 04-557-B-M3).

338 *See* discussion *supra* Part II.A.1.a; *see also* Walters, *supra* note 110, at 445.

339 260 F.3d 68 (2d Cir. 2001).

340 *See supra* notes 260–270 and accompanying text.

341 *See* United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

342 McGinty, *supra* note 85, at 213–14.

343 *Id*.

addressed this issue decided in favor of Casino City's position.[344] In the 2002 case *In re MasterCard Int'l Inc.*, the Fifth Circuit ruled that the Wire Act did not outlaw Internet gambling.[345] Here, the plaintiffs filed suit against MasterCard International, Visa International, and the banks that issued their MasterCard and Visa credit cards[346] under the Racketeer Influenced and Corrupt Organizational Act ("RICO")[347] seeking to avoid substantial debts they incurred when they used their credit cards to gamble at online casinos.[348] The plaintiffs identified three substantive federal crimes—"violations of the Wire Act, mail fraud, and wire fraud"—as predicates to the RICO violations.[349] They alleged that the defendants, through their association with Internet casinos,[350] "participated in and aided and abetted conduct that violated various federal and state criminal laws applicable to Internet gambling."[351]

The Fifth Circuit held that the plaintiffs' allegations did not "show a pattern of racketeering activity or the collection of unlawful debt."[352] Significantly, the plaintiffs could not rely on the Wire Act as a predicate offense because they had failed to allege they had engaged in Internet *sports* betting.[353] The court reasoned that "[b]ecause the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal."[354] Since the plaintiffs' debts *were* legal, the defendants could not have acted fraudulently when they *represented* the plaintiffs' debts as legal.[355] Furthermore, the plaintiffs could not "rely on the federal mail or wire fraud statutes

344 *See In re* MasterCard Int'l Inc., 313 F.3d 257, 262–63 (5th Cir. 2002).

345 *See id.* This suit arose out of thirty-three virtually identical cases that were transferred to the Eastern District of Louisiana through multidistrict litigation, two of which were selected as test cases and consolidated for pre-trial purposes. *See In re* MasterCard Int'l Inc., 132 F. Supp. 2d 468, 471 n.1 (E.D. La. 2001), *aff'd* 313 F.3d 257 (5th Cir. 2002).

346 *See id.*

347 18 U.S.C. §§ 1961–68 (2000 & Supp. 2001).

348 *See In re MasterCard Int'l*, 313 F.3d at 259.

349 *Id.* at 262 (citing 18 U.S.C. §§ 1084, 1341, 1343 (2000)).

350 *See id.* at 260.

351 *Id.*

352 *Id.* at 261.

353 *See id.* at 262–63.

354 *Id.* at 263.

355 *Id.*

to show RICO predicate acts" because they had failed "to allege that they relied upon the Defendant's representations in deciding to gamble."[356] Finally, because "neither the Wire Act nor the mail and wire fraud statutes [could] serve as predicates," the court noted that it did not have to "consider the other federal statutes identified by the Plaintiffs."[357] The court reasoned that the Travel Act and Illegal Gambling Business Act could "not serve as predicates here because the Defendants did not violate any applicable federal or state law."[358]

In *In re MasterCard*, the Fifth Circuit strongly stated that the Wire Act did not prohibit casino-style Internet gambling.[359] Casino City filed its action in the Middle District of Louisiana,[360] which is within the Fifth Circuit. Presumably, Casino City expects that the Louisiana district court will follow the binding precedent of its jurisdiction and hold that non-sports related Internet gambling is lawful activity, and that the court will extend its holding to Internet sports gambling as well.

b) The Travel Act and Illegal Gambling Business Act Do Not Outlaw Internet Gambling

In addition to the Wire Act, Casino City argues that the government's application of the Travel Act[361] and Illegal Gambling Business Act[362] against it violates the First Amendment.[363] Because these laws both require a predicate violation of state or local law,[364] at most the DOJ can utilize them

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[356] *Id.*

[357] *Id.* n.27.

[358] *Id.* The Fifth Circuit emphasized that the plaintiffs were "independent actors who made a knowing and voluntary choice to engage in a course of conduct." *Id.* at 264. "In engaging in this conduct, they got exactly what they bargained for—gambling 'chips' with which they could place wagers." *Id.* Therefore, they could not "use RICO to avoid meeting obligations they voluntarily took on." *Id.*

[359] Although it implied that the Wire Act may prohibit online sports betting. *See id.* at 262.

[360] Complaint at 1, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

[361] 18 U.S.C. § 1952 (2000 & Supp. 2002).

[362] 18 U.S.C. § 1955 (2000).

[363] Complaint at 4, *Casino City* (No. 04-557-B-M3).

[364] *See* Rodefer, *supra* note 95; Rodefer, *supra* note 103.

only to help prosecute gambling websites that operate in states that have explicitly outlawed online gambling.[365] Therefore, these federal laws render Internet gambling illegal.

c) The Federal Government Has Failed to Pass Any Legislation Outlawing Internet Gambling

In addition, Casino City argues that the majority of Congress does not share the DOJ's desire to "protect" the American public from Internet gambling.[366] Casino City's website provides a statement from congressional Representative Barney Frank (D-Mass) in support of this position:

> I would have hoped that the American experience with alcohol in the '20s and '30s would have made my colleagues far more skeptical of new forms of prohibition than they have been. I agree with you that this legislation violates the principle of leaving the Internet unregulated, and violates as well the privacy of millions of Americans. While I do not myself gamble, I think it is a choice that adults should be able to make for themselves, and I do not support restrictions of this sort, especially when it involves a very intrusive form of regulation of the Internet . . . .[367]

Similarly, the numerous failed Congressional attempts to outlaw Internet gambling supports Casino City's position that current federal law does *not* outlaw Internet gambling.[368]

d) Internet Gambling is Legal in Other Countries that Access Casino City's Websites via the Internet

In addition, Casino City contends that because of the Internet's borderless nature, an advertisement for a product or service that is illegal in the United States should be considered "lawful" for

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[365] *Cf.* Rodefer, *supra* note 95; Rodefer, *supra* note 103.

[366] *See* discussion *supra* Part I.A.2.

[367] *Casino City First Amendment Complaint Overview*, *supra* note 9 (responding to a letter from Casino City CEO Michael Corfman).

[368] *See* discussion *supra* Part I.A.2 (describing the attempted legislation).

Central Hudson purposes if it is legal anywhere in the world.[369] Because Casino City's website can be accessed throughout the world, including jurisdictions in which online gambling is legal, Casino City asserts that the DOJ cannot restrict advertising for gambling websites regardless of the legality of the underlying activity in the United States.[370] Casino City grounds this argument in *Reno v. ACLU*,[371] in which the Supreme Court confronted a First Amendment challenge regarding the implications of pornography over the Internet.[372] Casino City argues that under *Reno*, "the DOJ cannot assert that the advertisements placed by Casino City concern per se illegal conduct, unprotected by the First Amendment [because t]he Internet is a 'vast platform' from which publishers, advertisers and the like can address and hear from a 'worldwide audience . . . .'"[373]

Casino City contends that its claim "is not factually dissimilar to the broadcasters' claim in *Greater New Orleans Broadcasting*," in which the Supreme Court held that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."[374] *Greater New Orleans* concerned activities that were illegal in some *states* but not prohibited by federal law,[375] as opposed to activities that are

[369] *See* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 22–23, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

[370] *See id.* at 21–22.

[371] *See* Reno v. ACLU, 521 U.S. 844 (1997).

[372] *See id.* at 584 (striking down the Communications Decency Act's prohibition on the knowing transmission of "indecent" material to anyone under the age of eighteen); Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 18–21, *Casino City* (No. 04-557-B-M3).

[373] *Id.* at 21.

[374] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999) (internal citations omitted). The Supreme Court first mentioned this doctrine in the 1975 *Bigelow* case. Bigelow v. Virginia, 421 U.S. 809, 822–24 (1975). In that decision, the Court emphasized that the services advertised in the newspaper were legal in New York at that time, and reasoned that the Virginia Legislature could not curtail the dissemination of information about services legal in another state over which Virginia had no regulatory authority. *See id.*

[375] *Greater New Orleans*, 527 U.S. at 176.

expressly legal in other *countries* only.[376] However, Casino City argues that its claim is even "more compelling" than the claim in *Greater New Orleans* because it "involves substantial and new considerations not present in *Greater New Orleans Broadcasting*,"[377] including "the implications of the less 'invasive' Internet and the accessibility of the commercial speech on the Internet by persons located around the world where online sportsbooks and online casinos are not illegal."[378]

Casino City supports its position that Internet gambling is not "illegal" for purposes of the *Central Hudson* test, regardless of its legal status in the United States, by referring to a November 2004 ruling by the World Trade Organization ("WTO").[379] The WTO ruled that United States restrictions on Internet gambling violated free trade commitments the United States made as a member of the WTO, and that the United States government should drop its prohibitions on Americans placing bets on online casinos.[380] Online gambling operators hailed the judgment a major victory.[381] United States officials were quick to denounce the ruling,[382] stating that their WTO commitments were clearly intended to exclude gambling,[383] and calling the ruling "an effort to extend the values

[376] Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 21–22, *Casino City* (No. 04-557-B-M3) (providing that once advertisements for online sports books and casinos are on its portal, "the advertisements are available for viewing by tens of millions of people making up the worldwide audience of the Internet, many of whom are located in countries where engaging in the conduct that is advertised is expressly legal").

[377] *Id.* at 22.

[378] *Id.*

[379] *See* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 19, *Casino City* (No. 04-557-B-M3); Associated Press, *Update 1: WTO: U.S. Should Drop Gambling Ban* (Nov. 10, 2004), *available at* http://www.forbes.com/work-/feeds/ap/2004/11/10/ap1647030.html. The WTO decision confirmed a preliminary ruling issued by the panel in March 2004. *Id.*

[380] *See id.*

[381] Rick Smith & Keith Furlong, *Antigua v. U.S., David vs. Goliath: The U.S. Protects its Own, the World Trade Organization and Online Gaming*, Interactive Gaming Council, *at* http://www.igcouncil.org/read_news.php?id=5 (May 13, 2004).

[382] *Id.* (arguing that gambling is not included among the "services" in the trade agreement).

[383] *See id.*

of other countries to the United States."[384] The Bush administration immediately appealed the decision.[385]

The ruling supports Casino City's argument that the United States' fears about online gambling are not shared by many other jurisdictions that have legalized online gambling and have access to Casino City's webpage.[386] Indeed, some of the Internet gambling websites in dispute are licensed and legally based in Great Britain,[387] and the Canadian football league recently signed a sponsorship deal with sports gambling websites.[388] The sanctioning of online gambling by nations like Great Britain and Canada, which have similar economic, social, and security interests to the United States, seems to refute the Justice Department's claims that online gambling is so dangerous it should be prohibited outright.[389] Given the unique global nature of the Internet, Casino City contends that Internet gambling is "lawful" under *Central Hudson* regardless of its legal status in the United States.

2. Advertising for Gambling Websites Does Not Constitute "Aiding and Abetting" Illegal Activity

After establishing the legality of Internet gambling, Casino City's next argument is that the federal government, having failed to explicitly criminalize Internet gambling, cannot prosecute American media companies that advertise these websites under the "aiding and abetting" statute.[390] In its complaint, Casino City argues that the DOJ's application of the "aiding and abetting" statute to it and others similarly situated—specifically with respect

[384] Richtel, *U.S. Against Online Casinos*, *supra* note 4. For example, Rep. Michael Oxley said that "the WTO's action has significantly reduced its status and credibility as a reliable arbiter of international trade disputes." Smith & Furlong, *supra* note 381.

[385] *See* Smith & Furlong, *supra* note 381.

[386] *See generally id.*

[387] *See* Richtel, *U.S. Against Online Casinos*, *supra* note 4.

[388] *See* Canadian Press, *CFL to be Sponsored by Off-Shore Gambling Company*, FORT MCMURRAY TODAY (Alta.), Oct. 13, 2004, at B2.

[389] *See* Richtel, *U.S. Against Online Casinos*, *supra* note 4.

[390] *See* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 21–22, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004); Complaint at 4, *Casino City* (No. 04-557-B-M3).

to aiding and abetting a violation of the Wire Act, Travel Act, or Illegal Gambling Business Act—violates the First Amendment.[391]

The federal government is attempting to prosecute advertisers through the "aiding and abetting" statute because of the lack of any explicit federal anti-Internet gambling laws and the fact that only a small number of states have outlawed Internet gambling.[392] However, even if some forms of Internet gambling were illegal under federal law, the "aiding and abetting" statute requires a showing that the defendant *willfully* associated himself with a criminal enterprise.[393] The courts will generally cut off the reach of a statute "if it is applied to situations absurdly remote from the concerns of the statute's framers."[394] Thus far, this "remoteness" principle has prevented credit card companies from being prosecuted for aiding and abetting illegal online gambling enterprises.[395] Concerns about the remoteness of association apply to advertisers as well as credit card companies.[396] This argument is particularly strong for advertisers in the wake of the Supreme Court's pronouncement in *Greater New Orleans* that restrictions on speech require greater scrutiny than restrictions on the underlying conduct.[397]

3. Internet Gambling Advertising Satisfies the *Central Hudson* Analysis

To prevail in this action, Casino City will have to prove that online gambling is lawful activity, and that the government's advertising ban violates the second, third, or fourth prong of the *Central Hudson* test, which applies when the government attempts

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391 Complaint at 4, *Casino City* (No. 04-557-B-M3).

392 *See* discussion *supra* Part I.A.2.

393 18 U.S.C. § 2 (2000); Walters, *supra* note 110, at 446.

394 Walters, *supra* note 8, at 116.

395 *See id.* (citing Jubelirer v. MasterCard Int'l, Inc, 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999). *But see supra* note 50 (New York Attorney General Eliot Spitzer accused Citibank of knowingly profiting from an illegal activity, which could have resulted in criminal liability under New York law. Citibank denied any wrongdoing but agreed to contribute $400,000 to compulsive gambler counseling services and stopped allowing its credit cards to be utilized for online gambling).

396 *See generally* Walters, *supra* note 8, at 116.

397 *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999); *see also supra* note 374 and accompanying text.

to regulate speech about legal, nonmisleading activity.[398] Regarding step two, Casino City alleges in its complaint against the DOJ that the "United States does not have a substantial interest sufficient to justify the imposition upon the exercise of free expression" resulting from the DOJ's actions.[399] The Supreme Court's recent skepticism toward governmental "interests" in regulating gambling speech, given all of the pro-gambling statutes Congress has enacted in recent years, supports Casino City's position on this issue.[400]

Casino City further alleges that the DOJ's threatened actions "would not effectively serve any purported government interest,"[401] thereby failing to satisfy step three of the *Central Hudson* test.[402] Casino City argues that in this case:

> The DOJ has no evidence of a harm and certainly no evidence that its restriction will alleviate the speculative harm to a "material degree." . . . Banning U.S. portals from carrying Internet gaming advertisements does little if anything to remove the advertisements from the Internet as foreign based portals will continue to carry them unabated. This fact wholly undermines the DOJ's already weak and speculative argument.[403]

The inconsistency of the government's position on alternate types of gambling—in that it simultaneously encourages state-run and Indian-run casinos[404] and discourages Internet gambling[405]—also supports Casino City's argument that the DOJ's actions do not directly advance the governmental interest.

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[398] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[399] Complaint at 4, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

[400] *See Greater New Orleans*, 527 U.S. at 186–87.

[401] Complaint at 4, *Casino City* (No. 04-557-B-M3).

[402] *See Cent. Hudson*, 447 U.S. at 566.

[403] Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25–26, *Casino City* (No. 04-557-B-M3).

[404] *See Greater New Orleans*, 527 U.S. at 190–91.

[405] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 19–22, *Casino City* (No. 04-557-B-M3).

Casino City also asserts that the government's "application is not narrowly drawn to effectuate any purported government interest"[406] and thus the DOJ fails the fourth step of the *Central Hudson* test.[407] Casino City claims that "[n]o factual record has been developed or evidence offered" to support the DOJ's claim of a "reasonable fit."[408] Furthermore, the government does not have extra leeway to regulate this commercial speech because it is related to "vice" activities.[409] In *44 Liquormart* and subsequent cases, the Supreme Court squarely rejected the government's paternalistic interest in restricting advertising for "vice" activities.[410]

Casino City argues that the DOJ's efforts to prosecute Internet gambling advertisers for aiding and abetting criminal activity fail the second, third, and fourth prongs of the *Central Hudson* analysis, and that the advertisements are thus protected by the First Amendment; therefore, online gambling is legal under federal law and satisfies the *Central Hudson* test.[411] Furthermore, Casino City argues that the aiding and abetting theory is not applicable to online gambling advertising due to the tenuousness of the link between the advertisers and any unlawful activity.[412] Finally, based on the Supreme Court's holdings in *Reno* and *Greater New Orleans*, and the recent WTO decision, Casino City contends that it has the First Amendment right to advertise online gambling regardless of the legality of the underlying conduct under federal law.[413]

Casino City and the Department of Justice both have compelling arguments, supported by statutory interpretation and

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406 Complaint at 4, *Casino City* (No. 04-557-B-M3).

407 *See Cent. Hudson*, 447 U.S. at 566.

408 Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 26, *Casino City* (No. 04-557-B-M3).

409 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513–14 (1996); *see also* discussion *supra* Part I.B.3.

410 *See 44 Liquormart*, 517 U.S. at 513–14; *supra* notes 202–214; *see also, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 589 (2001).

411 *See Cent. Hudson*, 447 U.S. at 566.

412 *See* discussion *supra* Part II.B.2.

413 *See* discussion *supra* Part II.B.1.d.

case law.[414] To determine which side should prevail, the two major issues to be resolved are: (1) whether or not online gambling is illegal under federal law, and (2) whether the DOJ's actions satisfy the final three increasingly strict prongs of the *Central Hudson* analysis.

III. UNDER THE *CENTRAL HUDSON* TEST, THE DOJ MAY PROHIBIT THE ADVERTISING OF ONLINE SPORTSBOOKS BUT NOT ONLINE CASINOS

An analysis of the federal case law and statutory scheme through the paradigm of the Casino City action indicates that the federal government may lawfully prohibit Casino City from advertising for online sportsbooks but not online casino-style gambling. The DOJ is correct that the Wire Act makes Internet sports gambling illegal under federal law.[415] Therefore, advertisements for sports wagering websites constitute commercial speech regarding an unlawful activity, which will fail step one of the *Central Hudson* test and not be protected by the First Amendment.[416] By contrast, neither the Wire Act nor other federal laws prohibit casino-style Internet gambling, which means the First Amendment protects advertisements for this activity.[417] Although the DOJ has a "substantial interest" in banning these advertisements, its actions do not satisfy steps three or four of the *Central Hudson* test because they do not directly advance a substantial government interest and are more extensive than necessary to serve the government's interest.[418] Therefore, Casino City should win a declaratory judgment entitling it to continue advertising online casinos, but prohibiting it from further advertising online sportsbooks. If the federal government wants to prohibit casino-style Internet gambling, or impose a blanket ban on

414 *See* discussion *supra* Part II.A.
415 *See* discussion *supra* Part II.A.1.a.
416 *See id*.
417 *See* discussion *supra* Part II.B.1.
418 *See supra* notes 401–410 and accompanying text.

its advertising, Congress "must make its intentions clear in the form of new legislation" outlawing the activity.[419]

A. Central Hudson Step 1: Online Casino-Style Gambling Is "Lawful Activity" but Online Sports Betting Is Not "Lawful Activity"

Online sports wagering is illegal under the Wire Act;[420] therefore, its advertisement is not protected by the First Amendment under step one of the *Central Hudson* analysis.[421] Conversely, online casino-style gambling is not explicitly prohibited by the Wire Act or any other federal law,[422] it is not expressly prohibited by the majority of the States,[423] and it is not illegal in the countries where the websites are based.[424] Accordingly, advertising for online casinos constitutes lawful commercial speech that warrants First Amendment protection under *Central Hudson*.[425]

The first step in the *Central Hudson* analysis is to determine whether online gambling advertisements are protected by the First Amendment.[426] *Central Hudson* clearly establishes that the First Amendment does not protect illegal or misleading commercial speech.[427] In addition, "[c]ase law indicates that the first prong of *Central Hudson* generally has been interpreted liberally."[428]

An analysis of the plain meaning and legislative history of the Wire Act makes clear that the statute can be applied to transactions over the Internet. The plain meaning of the phrase "transmission

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[419] Manter, *supra* note 6, at 11.
[420] 18 U.S.C. § 1084 (2000).
[421] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
[422] *See* 18 U.S.C. §§ 1084, 1952, 1955 (2000 & Supp. 2002); 28 U.S.C. §§ 3701–04 (2000).
[423] *See* discussion *supra* Part I.B.
[424] *See* discussion *supra* Part I.B.1.d.
[425] *See Cent. Hudson*, 447 U.S. at 566.
[426] *See id.*
[427] *See id.* at 563–64.
[428] Burke, *supra* note 127, at 486–87 (citing United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993); Bigelow v. Virginia, 421 U.S. 809, 822–23 (1975)).

of a wire communication"[429] is "flexible enough to allow its application to Internet gambling transactions"[430] even though the Wire Act was promulgated before the Internet existed.[431] This is because "[a]t some point in all Internet transactions, even so-called wireless connections that were not possible at the time the [Wire Act] was enacted, [phone, cable, or other] wires are still typically used."[432] The legislative intent of the Wire Act supports a broad interpretation of the phrase "transmission of a wire communication."[433] Congress promulgated the Wire Act to assist states in enforcing their gambling laws by prohibiting the use of wire communication facilities for gambling transmissions in interstate and foreign commerce.[434] The same justifications are applicable to Internet gambling today because the States that have outlawed Internet gambling need federal help to pursue the crime due to the difficulty and expense involved.[435] Thus, the *Cohen* court correctly held that the phrase "transmission of a wire communication" could be interpreted to outlaw gambling via the Internet.[436]

The Wire Act does not proscribe *all* Internet gambling, however – only Internet *sports* gambling.[437] The statute makes unlawful the wire transmission of bets or wagers on "any sporting event or contest."[438]

There are different opinions as to whether Congress intended the word "sporting" to modify both "event" and "contest," or only to modify "event."[439] While "[a] narrow construction would seem

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429 18 U.S.C. § 1084(a) (2000).

430 McGinty, *supra* note 85, at 212. "Depending on how Internet technology develops, however, future Internet communications may no longer be wire communications covered under the Wire Act." GAO INTERNET GAMBLING REPORT, *supra* note 26, at 13.

431 McGinty, *supra* note 85, at 210; *see also supra* note 84 and accompanying text.

432 *Id.* at 212.

433 *See id.* at 213; *see also* Rodefer, *supra* note 84.

434 *See* McGinty, *supra* note 85, at 212–13.

435 *See id.* at 213.

436 *See* United States v. Cohen, 260 F.3d 68, 76 (2d Cir. 2001).

437 *See* 18 U.S.C. § 1084 (2000); *see also In re* MasterCard Int'l, Inc., 132 F. Supp. 2d 468, 480 (E.D. La. 2001).

438 18 U.S.C. § 1084(a).

439 *See* Rodefer, *supra* note 84.

to suggest that the phrase is limited to sports-related activities,"[440] a broad interpretation would encompass traditional casino games or games of chance, and include non-sports related Internet gambling in the Wire Act prohibitions.[441] The statutory language, legislative history, and case law all support a narrow interpretation of the term "sporting event or contest" to render the Wire Act applicable only to online sports betting.[442]

The phrase "sporting event or contest" is not defined in the Wire Act itself.[443] However, the definitional section that applies to the Wire Act[444] defines "gambling establishment" as "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including . . . a policy game or any other lottery, or playing a game of chance, for money or other thing of value."[445] Similarly, under the Illegal Gambling Business Act,[446] "gambling includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."[447] Congress' use of these terms and definitions indicates that it was aware of the various forms of gambling but specifically limited the Wire Act's application to "sporting events or contests."[448]

The legislative history of the Wire Act also supports a narrow construction of the term "sporting event or contest" in which "sporting" modifies both "event" and "contest."[449] First, the legislation was entitled "Sporting Events—Transmission of Bets, Wagers, and Related Information."[450] Second, the 1961 House of Representatives Report on Senate Bill 1656 states that the Wire

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[440] *Id.*
[441] *See id.*
[442] *Id.*
[443] 18 U.S.C. § 1084 (2000).
[444] 18 U.S.C. § 1081 (2000); *see also* Rodefer, *supra* note 84.
[445] 18 U.S.C. § 1081.
[446] 18 U.S.C. § 1955 (2000).
[447] *Id.* § 1955(b)(2).
[448] *See* Rodefer, *supra* note 84.
[449] *See id.*
[450] *Id.* (citing Sporting Events—Transmission of Bets, Wagers, and Related Information Act, Pub. L. No. 87-216, § 2, 75 Stat. 491, 552–53 (1961)).

Act was being passed in response to "modern bookmaking" and interchangeably utilizes the terms "sporting event or contest" and "sporting event."[451] Third, the 1961 Report contains a letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives that refers only to wagering on sporting events in its discussion of the legislation.[452] Thus, the legislative history clearly demonstrates the lawmakers' belief that the Wire Act only applied to sports betting and not to games of chance.

The holdings of the Second and Fifth Circuits in *Cohen*[453] and *In re MasterCard*[454] are both consistent with this interpretation of the Wire Act. Indeed, in *Cohen*, Jay Cohen was convicted of running an Internet sports betting operation in violation of the Wire Act.[455] In *In re MasterCard*, the Fifth Circuit held that the plaintiffs could not rely on the Wire Act as a predicate offense to their RICO charges because they had failed to allege they had engaged in Internet sports betting.[456] The court stated: "[T]he Wire Act does not prohibit non-sports internet gambling,"[457] and so "any debts incurred in connection with such gambling are not illegal."[458] Essentially, the Second Circuit was correct that the Wire Act prohibits Internet sports wagering,[459] and the Fifth Circuit was correct that the Wire Act does not prohibit non-sports related Internet gambling.[460]

The statutory text, legislative history, and case law support the conclusion that Internet sports wagering is illegal under the Wire Act but other types of Internet gambling are permissible. Because online sports wagering is not "lawful activity" under United States law, it fails step one of the *Central Hudson* test and the DOJ can

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[451] *Id.* (quoting H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631–33).

[452] *Id.* (citing H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633–34).

[453] United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

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

[455] *See Cohen*, 260 F.3d at 71.

[456] *See In re MasterCard*, 313 F.3d at 262.

[457] *Id.* at 263.

[458] *Id.*

[459] *See Cohen*, 260 F.3d at 76.

[460] *See In re MasterCard Int'l*, 313 F.3d. at 263.

prohibit its advertisement. Casino City's argument "that the activity it is advertising is not 'per se' illegal [under *Central Hudson*] because there are places in the world where Internet gambling is legal, and because plaintiff cannot control the community where its advertisements appear due to the nature of the Internet,"[461] is without merit. The Wire Act renders online sports wagering illegal "everywhere in this country."[462] Furthermore, Casino City "identifies no support in any jurisdiction . . . for a rule that would allow the world's most permissive legal regimes to influence in any way the ability of this country to enforce its laws."[463] Although Casino City relies on *Greater New Orleans* for support, that case concerned land-based gambling, which was illegal in some states but not prohibited by federal law.[464] It is a huge leap to expand the Supreme Court's reasoning to argue that the United States cannot curtail the dissemination of information about services that are legal in other countries but prohibited by federal law.[465] Since essentially any product or service can be advertised online today, such a ruling would severely undermine the government's law enforcement power.[466] Therefore, Casino City fails step one of the *Central Hudson* test with regard to advertising online sports betting.

This logic does not apply to casino-style online gambling, however, because this activity is not prohibited by the Wire Act.[467] Nor is casino-style Internet gambling expressly outlawed by the Travel Act or Illegal Gambling Business Act.[468] Both of these statutes require predicate violations of state or local law,[469] and could probably be utilized to prosecute Internet gambling outfits that operated in states that had explicitly outlawed Internet

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[461] Reply Brief in Support of Defendant's Motion to Dismiss at 1, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (restating Casino City's argument).

[462] *Id.*

[463] Reply Brief in Support of Defendant's Motion to Dismiss at 9, *Casino City* (No. 04-557-B-M3).

[464] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999).

[465] *See generally id.*; Bigelow v. Virginia, 421 U.S. 809 (1975).

[466] *See generally* Reply Brief in Support of Defendant's Motion to Dismiss at 8–9, *Casino City* (No. 04-557-B-M3).

[467] *See supra* notes 437–466 and accompanying text.

[468] *See supra* note 364 and accompanying text.

[469] 18 U.S.C. §§ 1952(a), 1955(b)(1)(i) (2000).

gambling. However, the lack of a federal prohibition, along with the fact that only a few states have outlawed Internet gambling thus far, indicates that Internet gambling cannot be considered illegal under the Travel Act or Illegal Gambling Business Act for the purposes of the *Central Hudson* test. This is consistent with the Supreme Court's treatment of land-based gambling, which is legal in some states and illegal in others.[470]

The Supreme Court has held that one state "may not, under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that [other] state."[471] The Supreme Court would not extend this holding to protect commercial activities that were explicitly outlawed under federal law, such as online sports wagering.[472] However, the lack of any specific federal prohibition of casino-style Internet gambling, the fact that most online casinos are legal and licensed in their countries of origin, and the recent WTO ruling that United States criminalization of online betting violates global laws indicate that casino-style gambling is "lawful" for *Central Hudson* purposes.[473] Together, these factors generate too much uncertainty for a court to find that non-sports Internet gambling is illegal under step one of the *Central Hudson* test.

Because casino-style Internet gambling is not illegal under federal law, online casino advertisements warrant First Amendment protection unless the government can satisfy steps two through four of the *Central Hudson* analysis.[474]

B. Central Hudson Step 2: The DOJ Has a "Substantial" Interest in Restricting Internet Gambling Advertising

The federal government can satisfy step two of the *Central Hudson* analysis[475] because it has a "substantial interest" in reducing online casino-style gambling advertising. In this step,

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[470] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999).
[471] Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975).
[472] *See supra* notes 461–466 and accompanying text.
[473] *See supra* notes 369–389 and accompanying text.
[474] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
[475] *See id.*

"the Government bears the burden of identifying a substantial interest and justifying the challenged restriction."[476] Casino City argues that "the United States does not have a substantial interest sufficient to justify the imposition upon the exercise of free expression."[477] However, the DOJ does have a strong interest in reducing demand for online gambling operations, given that gambling websites can be so easily accessed by children and compulsive gamblers, and also due to the potential use of the websites for fraud and money laundering.[478]

Although the Supreme Court has been increasingly skeptical of the government's proffered interests in regulating commercial speech related to advertising for land-based gambling and other "vice" activities,[479] thus far it has always been willing to accept the government's interest in reducing commercial speech regarding gambling as "substantial."[480] In *Greater New Orleans*, the Supreme Court accepted the substantiality of the government's interest in restricting land-based gambling advertisements in order to reduce the social costs associated with casino gambling and to assist States that restricted gambling or prohibited casino gambling within their borders, despite its finding that the social costs were largely "offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits."[481] The Supreme Court was similarly skeptical of Rhode Island's alcohol price advertising ban in *44 Liquormart*, but nevertheless found that the state had a substantial interest in promoting temperance and reducing alcohol consumption.[482]

The federal government's interest in restricting advertising for online casinos is more compelling, and less worthy of skepticism, than in the context of land-based gambling because of the unique nature of Internet gambling. Internet gambling implicates

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

477 Complaint at 4, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

478 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21, *Casino City* (No. 04-557-B-M3).

479 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–03 (1996).

480 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001).

481 *Greater New Orleans*, 527 U.S. at 185–86.

482 *44 Liquormart*, 517 U.S. at 504.

dangerous social consequences that are not applicable to land-based gambling, such as the possibility of terrorist money laundering and consumer fraud, the inability to prevent children from gambling, and the inability to safeguard against compulsive gambling.[483] These unique social ills give the government a substantial interest in restricting this advertising.[484]

Furthermore, in contrast to the federal government's contradictory policies with regard to land-based gambling, its position against Internet gambling has been consistent and uniform.[485] In *Greater New Orleans*, the Supreme Court's skepticism about the substantiality of the federal government's interest was the result of the government's simultaneous encouragement of Native American and state-run casinos and lotteries and discouragement of privately-operated casinos.[486] This conflicting approach weakened the government's argument that the Communications Act should be applied to private land-based gambling advertising.[487] By contrast, the Bush administration's policy, like the Clinton administration's before it, is clearly anti-Internet gambling, and Congress has not promulgated any legislation condoning Internet gambling.[488] Therefore, the federal government has a consistent position of disfavoring Internet gambling, and can demonstrate that it has a substantial interest in reducing its demand.[489]

C. Central Hudson Step 3: The DOJ's Actions Do Not "Directly Advance" the Governmental Interest Asserted

Although the federal government has a substantial interest in prohibiting online gambling advertising, the DOJ cannot satisfy step three of the *Central Hudson* test because thus far it has failed to put forth any evidence beyond speculation or conjecture linking

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[483] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21, *Casino City* (No. 04-557-B-M3); McGinty, *supra* note 85, at 206–07.

[484] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21, *Casino City* (No. 04-557-B-M3).

[485] *See* discussion *supra* Part I.A.1.

[486] *See Greater New Orleans*, 527 U.S. at 190.

[487] *See id.*

[488] *See* discussion *supra* Part I.A.2.

[489] *See generally* discussion *supra* Part I.A.2.

online gambling advertising to the ills it hopes to remedy.[490] The DOJ's efforts to prohibit online casino-style gambling advertising constitute a "blanket ban" on truthful, nonmisleading commercial speech about lawful conduct.[491] Therefore, the government's action "strikes at the heart of the First Amendment"[492] and must be reviewed with "special care."[493] This means that under step three, the DOJ must demonstrate that the ban will *significantly* advance the government's interest.[494]

Step three also requires that the government's abridgement of commercial speech "directly advance" its asserted interest. As *Edenfield* instructs, the DOJ must demonstrate that the challenged advertising restrictions advance its interest "in a direct and material way."[495] This burden cannot be "satisfied by mere speculation or conjecture,"[496] nor by "anecdotal evidence and educated guesses."[497] Indeed, in *44 Liquormart*, Rhode Island failed to establish a "reasonable fit" between its abridgement of speech and its temperance goal because it did not provide *any evidence* of a connection between its price advertising ban and a significant change in alcohol consumption.[498] Conversely, in *Lorillard Tobacco*, the Massachusetts Attorney General satisfied step three because the state's tobacco advertising ban was based on studies that demonstrated a link between advertising and demand for cigarettes.[499] Step three also requires that commercial speech restrictions be rational and not be contradictory.[500] Thus, in *Rubin*, the Court struck down a labeling restriction because of the "overall

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[490] *See* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004); Complaint at 4, *Casino City* (No. 04-557-B-M3); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 574 (1980); *cf.* Edenfield v. Fane, 507 U.S. 761, 770 (1993).

[491] *Cf. Cent. Hudson*, 447 U.S. at 574.

[492] *Id.*

[493] *Id.* at 566 n.9.

[494] *Cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

[495] *Cf.* Edenfield, 507 U.S. at 771 (1993).

[496] *Id.* at 770.

[497] Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995).

[498] *See 44 Liquormart*, 517 U.S. at 506–07.

[499] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 560–61 (2001).

[500] *See Rubin*, 514 U.S. at 488.

irrationality" of the regulatory scheme, which prohibited the disclosure of alcohol content on beer labels but not in advertising.[501]

The DOJ cannot satisfy these high standards in the present case. It argues that its advertising ban "directly advances" the goal of the "aiding and abetting" statute because punishing and deterring advertising for online gambling operations reduces the ability of such operations to solicit customers.[502] However, as Casino City correctly points out, the DOJ's assertions are "legally insufficient" because the DOJ provides "no evidence of a harm and certainly no evidence that its restriction will alleviate the speculative harm to a 'material degree.'"[503]

The DOJ's actions clearly do not "directly advance" its interest in protecting the public from the social problems associated with online gambling, such as compulsive and underage gambling.[504] The Supreme Court has long been skeptical of governmental efforts to regulate commercial speech for the public's own good.[505] Indeed, *44 Liquormart* and subsequent cases established that states do "not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes."[506] In its motion to dismiss Casino City's complaint, the DOJ merely asserts that reducing advertising will reduce demand.[507] The DOJ does not support its hypothesis with any evidence as to how prosecuting American advertisers will reduce the social problems associated with Internet gambling, considering that foreign advertisers could continue to market Internet gambling to Americans outside the

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[501] *Id.*

[502] Memorandum of Law in Support of Defendant's Motion to Dismiss at 22, Casino City, Inc. v. United States Dep't of Justice (No. 04-557-B-M3) (M.D. La. filed Aug. 9, 2004).

[503] Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25, *Casino City* (No. 04-557-B-M3).

[504] *See generally id.*

[505] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 760–73 (1976) (holding that a consumer's interest in the free flow of commercial information is protected by the First Amendment because such information is necessary for well-informed private economic decisions).

[506] 44 Liquormart v. Rhode Island, 517 U.S. 484, 510 (1996).

[507] Memorandum of Law in Support of Defendant's Motion to Dismiss at 21–22, *Casino City* (No. 04-557-B-M3).

DOJ's jurisdictional reach.[508] Given the total lack of evidence provided, the DOJ's paternalistic interest in preventing the social ills it associates with Internet gambling cannot justify its blanket advertising ban under current First Amendment doctrine.[509]

Furthermore, the DOJ's actions do not "directly advance" its interest in protecting Americans from money laundering and consumer fraud.[510] Although the federal government has a substantial interest in protecting the safety and commercial interests of Americans that goes beyond paternalism, the DOJ's argument that terrorists and organized crime could use gambling websites to launder money fails step three due to a lack of any demonstrable evidence.[511] The Internet gambling prohibition was dropped from the final version of the Patriot Act due to the lack of substantial evidence of a connection between Internet gambling and terrorism.[512] Furthermore, the 2002 GAO Report to Congress on Internet gambling found that while law enforcement officials believed that money laundering could potentially be conducted on gambling websites, no cases of this had ever been prosecuted.[513] Additionally, "[r]epresentatives of the credit card and gambling industries believed that online gambling was not necessarily more susceptible to money laundering than any other type of on-line transaction."[514] The mixed views regarding online gambling's vulnerability to money laundering, along with the DOJ's failure to provide any evidence in support of its contention, destroy its step three argument.

Likewise, although the DOJ has a substantial interest in preventing gambling websites from defrauding American

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[508] *See* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25–26, *Casino City* (No. 04-557-B-M3).

[509] *Cf. 44 Liquormart*, 517 U.S. at 510.

[510] *See generally* Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25–26, *Casino City* (No. 04-557-B-M3).

[511] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 21–22, *Casino City* (No. 04-557-B-M3); Casino City, Inc.'s Memorandum of Law in Response to Defendant's Motion to Dismiss at 25, *Casino City* (No. 04-557-B-M3); *cf.* Edenfield v. Fane, 507 U.S. 761, 770 (1993).

[512] Manter, *supra* note 6, at 5.

[513] *See* GAO INTERNET GAMBLING REPORT, *supra* note 26, at 35.

[514] *Id.* While the views of the gambling industry here are not persuasive, the view of the credit card companies is revealing.

gamblers, it has not yet offered any evidence that fraud is actually occurring on these offshore websites.[515] Nor has the DOJ attempted to justify its advertising crackdown on consumer protection grounds.[516] If the fairness of online gambling was really the federal government's concern, it would be better alleviated by sanctioning domestic Internet gambling operations that could be audited and monitored.[517]

The Supreme Court has established a First Amendment doctrine that favors free consumer discourse and sets a high threshold for the government to justify restrictions on commercial speech.[518] Because the DOJ has not put forth any evidence beyond "speculation or conjecture" linking online gambling advertising to the ills it hopes to remedy, its enforcement actions do not "directly advance" its proffered interests and must fail step three of the *Central Hudson* test.[519]

D. Central Hudson Step 4: The DOJ's Restrictions Are "More Extensive than Necessary" to Serve the Governmental Interest

The DOJ's prosecution of online gambling advertisers also fails the fourth step of the *Central Hudson* analysis because its actions are "more extensive than necessary" to achieve its objective.[520] It is well established that step four requires a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends."[521] Here, the federal government's actions have not been "narrowly drawn to effectuate any purported government interest."[522] Therefore, there is no reasonable fit between the government's goal of reducing the

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[515] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 17–22, *Casino City* (No. 04-557-B-M3).

[516] *See id.*

[517] *See* Lang, *supra* note 26, at 548–49.

[518] *See id.*

[519] Complaint at 4, *Casino City* (No. 04-557-B-M3); *cf. Cent. Hudson*, 447 U.S. at 566.

[520] *Cent. Hudson*, 447 U.S. at 566.

[521] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001) (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)).

[522] Complaint at 4, *Casino City* (No. 04-557-B-M3).

demand for online gambling and its method of advancing this goal through advertising restrictions.[523]

To establish a reasonable fit, the government "is not required to employ the least restrictive means conceivable, but it must demonstrate *narrow tailoring* of the challenged regulation to the asserted interest."[524] The "challenged regulation should indicate that its proponent carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition."[525] In *Greater New Orleans*, the Supreme Court rejected the government's application of the Communications Act against private, land-based casinos, holding that "[t]here surely are practical and nonspeech-related forms of regulation . . . that could more directly and effectively alleviate some of the social costs of casino gambling."[526] Although Internet gambling is distinguishable from land-based gambling because most gambling websites operate outside the jurisdiction of the United States (which limits the alternative means of regulation such as audits and other oversight), the DOJ does not appear to have even *considered* any alternative means of reducing demand for online gambling before threatening online gambling advertisers.[527]

Furthermore, the federal government's actions are not narrowly tailored because the DOJ has targeted all types of online gambling advertising via all mediums, in all states.[528] First, the DOJ has not discriminated between online sportsbooks and casinos.[529] If it had focused on prosecuting Internet sports gambling advertising, it probably would have been within its authority under the Wire Act.[530] However, the subpoenas issued by the St. Louis U.S.

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[523] *Cf. Lorillard*, 533 U.S. at 556.

[524] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999) (emphasis added).

[525] *Id.* (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)) (internal quotations omitted).

[526] *Id.* at 192.

[527] *See generally* Memorandum of Law in Support of Defendant's Motion to Dismiss, *Casino City* (No. 04-557-B-M3); Reply Brief in Support of Defendant's Motion to Dismiss, *Casino City* (No. 04-557-B-M3).

[528] *Cf. Lorillard*, 533 U.S. at 562–63, 585 (finding an advertising ban to be "loosely tailored" due to its geographic scope and the breadth of advertisements it affected).

[529] *See* discussion *supra* Part I.A.1.

[530] *See supra* notes 420–460 and accompanying text.

Attorney General's office demanded information about both forms of gambling, and the money the DOJ seized from Discovery Networks was not strictly from sports wagering websites.[531] The federal government's actions are "more extensive than necessary" because they made no effort to distinguish between the types of gambling activity being advertised.

In addition, the DOJ's actions are fatally overbroad because it has not distinguished between advertising mediums.[532] The DOJ sent its June 2003 warning letters to trade groups representing major broadcasters and publishers.[533] The St. Louis U.S. Attorney General's office subpoenaed media outlets, Internet portals, public relations firms, and other companies.[534] This indicates the DOJ did not attempt to sculpt its actions into the existing federal statutes that regulate gambling advertising via television, radio, and direct mail.[535] For example, it could have potentially utilized the Communications Act to bar gambling websites from advertising via the radio and television in states that had expressly outlawed online gambling.[536] Although the Communications Act has been limited by recent First Amendment cases in the context of land-based gambling,[537] it could probably sustain a governmental attempt to prohibit the broadcast of online gambling advertisements because there are no conflicting federal statutes governing Internet gambling. Accordingly, the federal government could not be accused of inconsistent or contradictory legislation, as it was in *Greater New Orleans*.[538] The DOJ's actions may not have been considered overbroad if it had only targeted Internet

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[531] *See supra* notes 38–41 and accompanying text.

[532] *See generally supra* notes 38–41 and accompanying text.

[533] *See supra* note 33 and accompanying text.

[534] *See supra* note 38 and accompanying text.

[535] *Cf.* Walters, *supra* note 8, at 115–16 (describing federal regulatory options available depending on the medium chosen to market online gambling).

[536] *See* discussion *supra* Part I.A.4.a.

[537] *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195–96 (1999).

[538] *See id.* (holding that that the application of the Communications Act to the broadcast of gambling advertisements by radio or television stations located in a state where such gambling was legal violated the First Amendment). However, the Communications Act does not cover the Internet or cable television because they are not "broadcast" for the purposes of the Act. Walters, *supra* note 8, at 115–16.

gambling advertising via direct mail. Since the Direct Mail statute prohibits the use of the mail to advertise virtually all forms of gambling,[539] this statute would prohibit the use of the mail to promote online casinos.[540]

The DOJ overreached by targeting all media outlets—even companies like Casino City that advertise primarily over the Internet—in its campaign against online gambling. The inclusion of Internet advertisers is especially problematic.[541] In addition to the absence of a law similar to the Communications Act to restrict Internet gambling advertising, the Internet is distinguishable from television, radio, and direct mail because websites are generally not targeted to a specific jurisdiction, and can be accessed by users worldwide.[542] "Since Internet advertising is contemporaneously available everywhere on the planet, and not 'broadcast' in the traditional sense, an analysis based on the location of the transmission or recipient may be logically flawed."[543] A blanket ban on Internet gambling advertisements that are distributed via the Internet is "more extensive than necessary" because it restricts even advertisements targeted at foreign jurisdictions in which online gambling is lawful. This is pertinent within the United States as well, since casino-style Internet gambling is not prohibited by federal law, and not all states have outlawed Internet gambling.[544] This result may have been different if the government had, for example, required Casino City to filter its advertisements by jurisdiction, but the DOJ's attempt to prohibit the advertisements outright was "more extensive than necessary."[545]

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539 *See supra* notes 131, 134 and accompanying text.

540 *See* discussion *supra* Part I.A.4.b.

541 *See supra* note 38 and accompanying text.

542 *See* Walters, *supra* note 8, at 115; *supra* notes 369–389 and accompanying text.

543 Walters, *supra* note 8, at 115.

544 *See generally id.* at 113–15.

545 *See id.* at 121 ("The inability to effectively geographically limit the target audience for online gambling advertising may also impair the government's ability to constitutionally restrict advertising about online gaming services to areas where it is considered a legal activity."); *cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

In addition to the mediums of communication targeted by the DOJ, its actions are also overbroad because it has not discriminated between states that have outlawed Internet gambling and those that have not.[546] If the DOJ had focused on helping states that had outlawed Internet gambling, it probably could have utilized the Communications Act and the direct mail statute to prohibit the broadcast or direct mail advertising of online casinos in those states.[547] However, the DOJ approached this from the flawed perspective that all Internet gambling was illegal under federal law.[548] As a result, the DOJ's actions are "more extensive than necessary."

Finally, in a general sense, Casino City's case for advertising online casinos is supported by the Supreme Court's statement in *Greater New Orleans* that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct. It is well settled that the First Amendment mandates closer scrutiny of governmental restrictions on speech than of its regulation of commerce alone."[549] This declaration demonstrates the Supreme Court's increasing skepticism of commercial speech restrictions, and the strict degree of scrutiny with which the Court will evaluate step four as well as the other steps of the *Central Hudson* test.[550] Therefore, while the Supreme Court would likely uphold a commercial speech restriction if the underlying product or service was expressly illegal under federal law, it would be much more skeptical of barring commercial speech if the underlying conduct was not illegal nationwide.[551]

Because the DOJ threatened to prosecute all advertisers of Internet gambling services instead of limiting its efforts to the types of online gambling and mediums of communication it could

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[546] *See* discussion *supra* Part I.B.

[547] *See* discussion *supra* Parts I.A.4.a–b.

[548] *See* discussion *supra* Parts I.A.1, II.A.1.

[549] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999) (internal citations omitted).

[550] *Cf. id.*

[551] *Cf. id.*

lawfully regulate, its application was "more extensive than necessary" and will fail step four of the *Central Hudson* test.[552]

CONCLUSION

Internet gambling advertising raises unique and controversial First Amendment issues. Casino City's declaratory judgment action is complicated by the fact that all of the Supreme Court's past gambling advertising decisions have involved the use of traditional media, as opposed to the Internet. Thus far, courts have neither resolved the legality of Internet gambling itself, nor addressed the effect of the licensure of foreign online casinos. Nevertheless, an analysis of the First Amendment commercial speech doctrine and the existing federal gambling statutes reveals that Casino City should prevail in its claim that it has a First Amendment right to advertise online casinos, but fail in its attempt to advertise online sports wagering.

Advertising Internet sports gambling violates the first prong of the *Central Hudson* test because the correct interpretation of the Wire Act renders online sports betting illegal under federal law. Casino City's assertion that this activity is not "per se" illegal because there are places in the world where such gambling is legal is without merit. As such, advertisements for online sportsbooks are not protected by the First Amendment.

In contrast, casino-style Internet gambling falls within the protection of the First Amendment. These advertisements cannot be considered unlawful because online casinos are not currently illegal under the Wire Act or any other federal statute. Although the DOJ has a substantial interest in regulating online casinos due to the risk of fraud, addiction, and terrorist money laundering, the DOJ's recent prosecutorial efforts have not satisfied steps three or four of the *Central Hudson* test. The DOJ has offered no proof beyond "mere speculation or conjecture" that its broad enforcement actions against American media companies directly advance its proffered interest. In addition, the DOJ's efforts are

[552] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

"more extensive than necessary" because they target all types of Internet gambling, mediums of advertising, and states, instead of focusing on areas in which Internet gambling is explicitly outlawed, or mediums subject to federal gambling broadcast laws.

If the threats to American interests posed by Internet gambling are as serious as the federal government fears, Congress should persist in its efforts to give the DOJ the tools it needs to prevent offshore Internet casinos from reaching the American public. However, until new legislation is passed, Casino City will be entitled to advertise for Internet casinos, and the DOJ will be limited by the First Amendment to restricting advertising to only online sports wagering.