No. 98-387

In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to broadcast advertisements for legal casino gambling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) on remand from this Court's decision vacating the original opinion of the court of appeals for reconsideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), is reported at 149 F.3d 334. The prior opinion of the court of appeals (Pet. App. 23a-42a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 43a-56a) is reported at 866 F. Supp. 975.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The petition for a writ of certiorari was filed on September 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the radio or television broadcasting of "any advertisement of * * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." In the proceedings below, the Fifth Circuit held that Section 1304 does not violate the First Amendment. The same constitutional question is pending in *Players International, Inc.* v. *United States*, C.A. Nos. 98-5127 and 98-5242 (3d Cir.), and the United States is filing a petition for a writ of certiorari before judgment in *Players* in conjunction with the filing of this brief.

1. Section 1304 is part of a body of federal restrictions on lotteries and related gambling activities that has been maintained by Congress for more than 100 years. In 1868, Congress made it a crime to mail "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. After briefly limiting that mailing prohibition to illegal lotteries, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302, Congress extended the ban in 1876 to all lotteries and similar gambling enterprises, including ones chartered by state legislatures, Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90. In 1890, Congress extended the mailing prohibition from "letters or circulars" to newspapers, closing a major

loophole in the 1876 statute. Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465. Five years later, Congress moved to eliminate interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate or foreign commerce. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963. With exceptions noted below, those restrictions on interstate lotteries and related gambling activities remain in effect today. See generally 18 U.S.C. 1301 *et seq.*; 39 U.S.C. 3001(a), 3005; *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993).

In *Champion* v. *Ames*, 188 U.S. 321 (1903) the Court held that the 1895 prohibition on interstate transportation of lottery tickets was within the power of Congress under the Commerce Clause. In the course of its opinion, the Court summarized the policies behind the federal lottery statutes. The Court explained that lotteries were regarded by Congress as a "widespread pestilence." *Id.* at 356. Congress "shared the views" that a lottery is uniquely pernicious because it "enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; [and] it plunders the ignorant and simple." *Id.* at 355, 356. In addition, States that had themselves banned lotteries required congressional assistance to deal with the interstate aspects of lotteries. Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Id.* at 357. Thus, Congress intervened both to protect the public against the intrinsic ills associated with lotteries and to reinforce the efforts of anti-lottery States.

In the Communications Act of 1934, Congress added Section 1304 to this body of gambling restrictions. See ch. 652, § 316, 48 Stat. 1088. The Federal Communica-

tions Commission (FCC) subsequently adopted a parallel regulation, which is now codified as 47 C.F.R. 73.1211. Although Section 1304 is a criminal statute, it has not been enforced through criminal proceedings. Instead, the FCC has pursued administrative remedies for violations of its parallel regulation. The FCC can impose a variety of administrative sanctions on licensees for violations of the regulation, including monetary forfeitures and license revocation. See 47 U.S.C. 312(a)(6), 503(b)(1)(D) and (b)(2)(A).

By its terms, Section 1304 is not confined to lotteries but rather applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 290 (1954), this Court construed "lottery, gift enterprise, or similar scheme" to include any undertaking involving: "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." See also *Horner* v. *United States*, 147 U.S. 449, 458 (1893) ("[T]he term *lottery* embraces all schemes for the distribution of prizes by chance * * * and includes various forms of gambling."). In light of *American Broadcasting*, the FCC has consistently treated casino gambling as a form of "lottery, gift enterprise, or similar scheme," because virtually all casino gambling involves "the distribution of prizes" (money), "according to chance," "for a consideration" (the gambler's wager). As indicated below, Congress has likewise understood casino gambling to be covered by Section 1304, and that understanding has not been disputed in this case.

2. In the years since the enactment of Section 1304, Congress has amended the federal gambling statutes on several occasions to permit broadcast advertising of specific types of gambling activities. However, Con-

gress has repeatedly chosen not to lift the ban on broadcast advertising of commercial casino gambling.

a. During the late 1960s and early 1970s, a growing number of States began to conduct lotteries to raise money for government programs. Beginning in 1975, Congress amended the federal gambling statutes to take account of the growth of state-run lotteries. See 18 U.S.C. 1307(a)(1) and (b)(1). Congress sought to strike a balance, allowing the promotion of state-run lotteries within lottery States while simultaneously continuing to discourage participation by residents of non-lottery States. See S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974) (Senate Lottery Report); H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974) (House Lottery Report). To accomplish this, Congress allowed the broadcasting of advertisements for a state-run lottery "by a radio or a television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress also made corresponding changes in the restrictions on lottery-related mail and interstate commerce. 18 U.S.C. 1307(a)(1)(A) and (b)(1).

Although Congress relaxed the restrictions on broadcast advertising of state-run lotteries, it left the federal restrictions on private gambling activities undisturbed. Congress remained "familiar with the kinds of abuses that existed one hundred years ago in the operation of private lottery schemes." Senate Lottery Report, *supra*, at 2. It was willing to relax restrictions on state-run lotteries because "[s]tate lotteries as operated * * * today represent an entirely different situation." *Ibid.* For example, Congress heard testimony that the procedures used by state-run lotteries "operate to hinder organized criminal groups from infiltrating or

stealing from these state lotteries." House Lottery Report, *supra*, at 6.

Although the 1975 legislation permits broadcast advertising of state-run lotteries in States that conduct lotteries, advertising of state-run lotteries remains unlawful in States that do not conduct lotteries. In *Edge Broadcasting*, *supra*, a broadcaster in a non-lottery State challenged the constitutionality of that restriction under the First Amendment. In rejecting that challenge, this Court held that the prohibition of broadcast advertising of state-run lotteries in non-lottery States satisfies the requirements of the First Amendment. 509 U.S. at 425.

b. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988) (Senate Indian Gaming Report). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the nation's Indian tribes, while simultaneously responding to concerns about potential criminal infiltration and other problems, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*).

As part of Congress's effort to "promot[e] tribal economic development" (25 U.S.C. 2702(1)), the IGRA exempts "any gaming conducted by an Indian tribe pursuant to this [Act]" from Section 1304's restrictions on broadcast advertising, 25 U.S.C. 2720. At the same time, the IGRA substantially tightens government oversight of Indian gambling by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts

between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2713. In addition, the IGRA ensures that the revenues of Indian gambling, unlike those of private casino gambling, are used solely for public purposes. The IGRA requires that net revenues be devoted exclusively to funding tribal governments, local government agencies, and charitable organizations; to promoting tribal economic development; or to providing for the welfare of the tribes and their members. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii) and (d)(2)(A).

c. In 1988, Congress also enacted the Charity Games Advertising Clarification Act, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307(a)). The Act removes federal advertising restrictions on legal lotteries run by charity groups and by "governmental organizations" other than the state-run lotteries already covered by the 1975 legislation. See 18 U.S.C. 1307(a)(2)(A). The Act also lifts advertising restrictions on "occasional and ancillary" promotional lotteries, such as a car dealership drawing for a new car. 18 U.S.C. 1307(a)(2)(B); see 134 Cong. Rec. 31,075 (1988) (Senate Judiciary Committee Report) (giving examples of promotional lotteries).

As originally proposed, the 1988 legislation would have removed advertising restrictions on all gambling allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). However, the House of Representatives adopted an amendment that specifically excluded casino gambling from the bill. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee stated that "no provision of [the bill] is intended to change current law as it applies to

interstate advertising of professional gambling activities." *Id.* at 31,075.

3. a. Petitioners are an association of television and radio broadcasters in New Orleans, Louisiana, and several individual members of the association. The association's member stations wish to broadcast advertisements for Louisiana and Mississippi casino gambling. They commenced this action in February 1994, contending that the application of Section 1304 to broadcast advertising for casino gambling in States where casino gambling is legal violates the First Amendment.

Petitioners' First Amendment challenge is based on the commercial speech principles recognized in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. Under *Central Hudson*, a legislative restriction on commercial speech is subject to a four-part inquiry: (1) whether the speech concerns lawful activity and is not misleading; and if so, (2) whether the asserted governmental interest for the provision is substantial; and if so, (3) whether the provision directly advances the asserted interest; and if so, (4) whether it is no more extensive than is necessary to serve that interest. *Id.* at 566.

Petitioners and the government filed cross-motions for summary judgment regarding the constitutionality of Section 1304. The government identified two distinct interests that are served by Section 1304: first, an interest in minimizing the social and economic costs associated with casino gambling and other kinds of "lottery, gift enterprise, or similar scheme[s]" by reducing public participation in such activities; and second, an interest in assisting States that prohibit or otherwise restrict gambling activities. The government contended that Section 1304 directly advances those interests by reducing public demand for gambling and by

excluding broadcast gambling advertising from non-gambling States. The government further contended that the statutory exceptions to Section 1304 do not affect its constitutionality and that the statute is not impermissibly restrictive.

At the time of the proceedings before the district court, the leading precedent regarding the constitutionality of restrictions on gambling advertising was *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, this Court sustained the constitutionality of a Puerto Rico statute that prohibited casino gambling advertisements directed at the residents of Puerto Rico. With regard to the second part of the *Central Hudson* test, the Court held that Puerto Rico had a substantial interest in protecting the "health, safety, and welfare of its citizens" by discouraging "[e]xcessive casino gambling." *Id.* at 341. With respect to the third part of the *Central Hudson* test, the Court held that it was "reasonable" for the Puerto Rico legislature to believe that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Id.* at 342. The Court held that the statute directly advanced the legislature's goals even though it applied only to casino gambling and not to other forms of gambling. *Id.* at 342-343. Finally, the Court held that the fourth part of the *Central Hudson* test did not require Puerto Rico to resort to alternative regulatory measures, such as anti-gambling "counterspeech," that did not involve restraints on commercial speech. *Id.* at 344.

Because this Court in *Posadas* had endorsed the governmental interests underlying the statute at issue in this case, the government did not present the district court in this case with evidence documenting the

specific social and economic costs of casino gambling. Because *Posadas* (and *Central Hudson* itself) treated the relationship between promotional advertising and consumer demand as axiomatic, the government also did not present evidence regarding the relationship between gambling advertising and demand for gambling. And because *Posadas* attached no constitutional significance to the limited breadth of the Puerto Rico statute or to the existence of regulatory alternatives that did not restrict speech, the government did not present evidence regarding the scope of the statutory exceptions to Section 1304 or the relative efficacy of potential regulatory alternatives. For their part, petitioners also did not proffer evidence on any of those subjects.

b. The district court entered summary judgment in favor of the government, holding that Section 1304 meets the constitutional requirements of *Central Hudson*, and the Fifth Circuit affirmed. See Pet. App. 23a-42a (court of appeals opinion); *id.* at 43a-56a (district court opinion). In April 1996, petitioners filed a petition for a writ of certiorari. *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 95-1708.

While the petition was pending, this Court issued its decision in *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996). In *44 Liquormart*, the Court held that Rhode Island statutes prohibiting the advertising of retail liquor prices violated the First Amendment. The Court's decision in *44 Liquormart* resulted in four separate opinions, which reflected divergent views regarding the proper contours of the commercial speech doctrine.

Justice Stevens delivered an opinion that was joined to varying degrees by five other Justices but that did

not command a majority for the principal parts of its First Amendment analysis. Justice Stevens proposed replacing the four-part *Central Hudson* test with "rigorous" First Amendment review "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.). Justice Stevens further concluded that the Rhode Island statutes failed to satisfy *Central Hudson* because the evidentiary record did not show that restrictions on price advertising would significantly reduce alcohol consumption and because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal." *Id.* at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). With respect to *Posadas*, Justice Stevens concluded that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *Id.* at 510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). Justice Thomas, writing separately, proposed a more fundamental departure from *Central Hudson* and *Posadas*, under which commercial speech restrictions motivated by an "asserted interest [in] keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace" would be unconstitutional *per se*. *Id.* at 518.

Justice O'Connor, joined by the Chief Justice, Justice Souter, and Justice Breyer, delivered an opinion concurring in the judgment. Justice O'Connor declined Justice Stevens' and Justice Thomas' proposals to abandon the general contours of the *Central Hudson* test.

Instead, Justice O'Connor concluded that the Rhode Island statutes were invalid under *Central Hudson*. Confining her analysis to the fourth part of the *Central Hudson* test, Justice O'Connor agreed with Justice Stevens that Rhode Island's price advertising ban was more extensive than necessary because Rhode Island had "other methods at its disposal," such as taxes, that would "more directly accomplish" the goal of raising prices without any limitation on commercial speech. 517 U.S. at 530. She also agreed with Justice Stevens that *Posadas* had been too deferential in accepting the legislature's judgments about "the effectiveness and reasonableness of [the] speech restriction" in that case and that a "more searching[]" judicial examination of "the relationship between the asserted goal and the speech restriction used to reach that goal" was required. *Id.* at 531. Justice Scalia, writing separately, agreed that the Rhode Island statutes were unconstitutional under *Central Hudson* but suggested that the commercial speech doctrine should be informed chiefly by the historical status of commercial speech at the time of the First and Fourteenth Amendments. *Id.* at 517-518.

c. Because the opinions in *44 Liquormart* collectively reflected an evolution in the Court's commercial speech jurisprudence, and because the opinions disavowed the Court's previously controlling reasoning in *Posadas* in specific respects, the government suggested that the Court remand this case to the Fifth Circuit for further consideration in light of *44 Liquormart*. The Court did so in October 1996. 519 U.S. 801.

On July 30, 1998, the Fifth Circuit issued a new decision that again sustained the constitutionality of Sec-

tion 1304. Pet. App. 1a-19a. Applying the basic framework of *Central Hudson* as elaborated in *44 Liquormart*, the court held that the governmental interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive. *Id.* at 4a-19a (Jones & Parker, JJ.). Chief Judge Politz dissented. *Id.* at 20a-22a.

With respect to the third component of the *Central Hudson* test, the court reasoned that Section 1304's prohibition on promotional advertising has a more direct and obvious impact on consumer demand than the restriction on price advertising in *44 Liquormart*, which affected demand only indirectly. Pet. App. 8a-9a. The court also found "no doubt" that Section 1304 "reinforces the policy of [S]tates, such as Texas, which do not permit casino gambling." *Id.* at 10a. The court acknowledged that Congress had enacted exceptions to Section 1304, but held that "[t]he government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope." *Id.* at 9a-10a.

Turning to the fourth part of the *Central Hudson* test, the court recognized that "[a]fter *44 Liquormart*, * * * the fourth-prong 'reasonable fit' inquiry * * * has become a tougher standard for the [government] to satisfy." Pet. App. 10a. The court held that Section 1304 "cannot be considered broader than necessary to control participation in casino gambling" even under

the more demanding standard of *44 Liquormart*. *Id.* at 16a. The court pointed out that Section 1304, unlike the Rhode Island statutes struck down in *44 Liquormart*, does not ban all forms of advertising; instead, it "targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children," while permitting advertising in newspapers, magazines, and billboards. *Ibid.* The court also pointed out that, although the indirect technique of restricting price advertising that Rhode Island employed in *44 Liquormart* was obviously less effective than direct regulatory means of reducing alcohol consumption, "regulation of promotional advertising directly influences consumer demand," and the effectiveness of non-advertising-related means of discouraging casino gambling is purely speculative. *Id.* at 16a-17a. The court finally noted that petitioners had not identified any "non-speech-related alternatives to [Section] 1304 as a means of assisting anti-gambling [S]tates." *Id.* at 17a.

4. a. In October 1996, shortly after this Court remanded the present case to the Fifth Circuit, an identical First Amendment challenge to Section 1304 was brought in *Players International, Inc.* v. *United States*, C.A. No. 96-cv-4911 (D.N.J.). The plaintiffs in *Players* include the National Association of Broadcasters, a number of state broadcasting associations, two New Jersey radio stations, and several corporations that operate gambling casinos. The plaintiffs in *Players*, like petitioners in this case, asserted that the application of Section 1304 to broadcast advertising for legal commercial casino gambling violates the First Amendment.

The district court proceedings in *Players*, unlike those in this case, took place after this Court's decision

in *44 Liquormart* and other intervening commercial speech decisions, such as *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). As a result, both sides in *Players* had an opportunity to present the district court with evidence responsive to the reasoning of the Court's most recent commercial speech decisions.

The government submitted detailed evidence regarding the economic and social problems, such as compulsive gambling and organized crime, associated with casino gambling and other gambling activities. The government also presented evidence that broadcast advertising is a particularly effective way of stimulating gambling activity and that restrictions on broadcast advertising materially reduce participation in gambling, thereby reducing gambling's attendant social and economic costs. The government presented evidence that private commercial casinos account for a large share of the national gambling market and that, for that and other reasons, the statutory exceptions to Section 1304 do not render the statute ineffective. Finally, the government presented evidence regarding the superiority of advertising restrictions over other regulatory alternatives as a means of limiting compulsive gambling. See C.A. App. 47-441, No. 98-5127 (3d Cir.).

b. In December 1997, the district court in *Players* issued an opinion and order entering summary judgment in favor of the plaintiffs and declaring that Section 1304 and the corresponding FCC regulation violate the plaintiffs' First Amendment rights. 988 F. Supp. 497. The district court denied a subsequent motion by the plaintiffs for the entry of a nationwide injunction, confining the scope of relief to the District of New Jersey. *Players Int'l, Inc.* v. *United States*, C.A. No. 96-cv-4911 (D.N.J. Apr. 1, 1998).

The United States and the FCC filed notices of appeal from the district court's judgment. The government's appeals (C.A. Nos. 98-5127 and 98-5242) have been briefed and are currently awaiting oral argument in the Third Circuit.[1] In conjunction with the filing of this brief, pursuant to 28 U.S.C. 1254(1) and 2101(e), the government is filing a petition for a writ of certiorari before judgment in *Players*.[2]

ARGUMENT

The decision of the Fifth Circuit is correct and does not conflict with any decision of this Court. The decision does conflict with the Ninth Circuit's decision in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (1997), cert. denied, 118 S. Ct. 1050 (1998), and, because of that conflict, consideration of the constitutionality of Section 1304 by this Court would be warranted in an appropriate case. This case, however, is not the appropriate vehicle for the Court to take up the constitutional question. Instead, the constitutionality of Section 1304 should be addressed in *Players International, Inc.* v. *United States*, C.A. Nos. 98-5127 and 98-5242 (3d Cir.), which presents the identical constitutional question in the context of a more extensive evidentiary record that was prepared specifically in response to this Court's most recent commercial speech precedents. The Court should deny the petition in this case or, alternatively, hold the petition in abeyance pending the eventual disposition of *Players*.

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[1] The plaintiffs in *Players* have filed a motion to stay further appellate proceedings pending this Court's disposition of the petition in this case. On October 5, 1998, the Third Circuit referred that motion to the merits panel.

[2] We will provide petitioners in this case with a copy of the government's petition in *Players*.

1. "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). The Court therefore adheres to "a fundamental rule of judicial restraint" that it "will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984); *Parker* v. *County of Los Angeles*, 338 U.S. 327, 333 (1949); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

One corollary to this basic principle of judicial restraint is that review of a statute's constitutionality should not be undertaken until this Court has the benefit of an evidentiary record that is suitable for resolution of the constitutional issue. The Court has long recognized "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions." *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938). "[B]efore * * * questions of constitutional law, both novel and of far-reaching importance, [are] passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond* v. *Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)). Cf. *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 574 (1949) (Frankfurter, J., dissenting) (giving examples of cases remanded "to avoid constitutional adjudication without adequate knowledge of the relevant facts"). When a court passes on the constitutionality of a federal law without a record that adequately illuminates

the constitutional issues, the court risks invalidating a statute that a more complete record would show to be within the constitutional authority of the political branches. In so doing, the court exceeds the proper bounds of "'the role assigned to the judiciary in a tripartite allocation of power.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)).

Here, the limited evidentiary record makes this case an unsuitable vehicle for this Court to resolve the constitutionality of Section 1304. The record in this case was created more than four years ago, long before the Court's most recent commercial speech decisions. At the time that the record was presented to the district court, the continuing authority of this Court's decision in *Posadas* was not in question. Not only did *Posadas* sustain the constitutionality of a similar prohibition on casino gambling advertising, but it did so without requiring an evidentiary showing regarding the costs of casino gambling, the efficacy of the advertising restrictions, or the relative effectiveness of regulatory alternatives. See p. 9, *supra.* The record in this case therefore does not document the social and economic ills associated with casino gambling; it does not contain evidence regarding the connection between broadcast advertising and public demand for gambling activities; it does not contain evidence regarding the practical scope and operation of the statutory exceptions to Section 1304; and it does not address the effectiveness of potential non-speech-related regulatory alternatives.

In contrast to the record in this case, the evidentiary record in *Players* was presented after this Court's decision in *44 Liquormart* and its other intervening commercial speech decisions and was prepared in direct

response to those decisions. As explained above, in *Players*, the government documented the economic and social problems associated with casino gambling and other gambling activities. The government presented evidence regarding the capacity of broadcast advertising to stimulate gambling activity and the corresponding effectiveness of restrictions on broadcast advertising as a means of reducing participation in gambling. The government presented evidence regarding the scope and operation of the statutory exceptions to Section 1304. And the government presented evidence addressing the relative efficacy of advertising restrictions and other regulatory alternatives. See p. 15, *supra*. *Players* thus contains a substantially more illuminating record regarding how Section 1304 works and what it accomplishes.

We do not mean to suggest that the record in the present case is inadequate to support the Fifth Circuit's judgment. To the contrary, under the governing legal principles as we understand them, the Fifth Circuit was correct in holding that Section 1304 does not violate the First Amendment, even on the limited record before it. The government interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive.

The statutory exceptions to Section 1304 do not prevent it from achieving the interests that underlie it. Cf. *Rubin* v. *Coors Brewing Co.*, 514 U.S. at 486 (irrational legislative scheme unable to achieve governmental purposes). The exceptions simply reflect a reasonable congressional judgment that certain kinds of gambling present lesser evils (due to their lesser relative scope and greater regulation) and countervailing social benefits that justify relief from the advertising ban. See Pet. App. 9a-10a. See also *United States* v.

Edge Broadcasting Co., 509 U.S. 418, 434 (1993) (government need not "make progress on every front before it can make progress on any front").

In addition, Section 1304 is sufficiently tailored to the interests that it advances. See Pet. App. 16a-17a. The statute targets those forms of advertising most likely to stimulate gambling activity and directly suppresses them so as to reduce demand for gambling, particularly gambling fueled by compulsive addiction. Cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (Stevens, J., joined by Kennedy, Souter, & Ginsburg, JJ.) (blanket ban on price advertising is a blunt and indirect instrument for raising liquor prices so as to reduce consumption and is obviously less effective than taxation or setting minimum prices); *id.* at 530 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ.) (same). Moreover, restricting broadcast advertising, which cannot be contained within state boundaries, is the only effective way to assist States that have outlawed casino gambling to shield their residents from advertisements for that activity.

Even though we believe that the record is sufficient to support the constitutionality of Section 1304 under the governing legal principles, this Court should not exercise its discretionary jurisdiction to resolve the constitutionality of Section 1304 on the basis of a limited record that was prepared without the benefit of the Court's most recent commercial speech jurisprudence (and in accordance with then-controlling legal precedent of this Court). That is particularly true when a far more suitable vehicle for review is available. If the Court should determine that our understanding of the governing legal principles is incomplete, the Court may find that facts necessary to the resolution of the constitutionality of Section 1304 were not fully devel-

oped because of the then-governing legal standards under which the record in this case was prepared. As the Court observed in another case presenting an important legal issue in the context of a limited factual record:

> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Kennedy v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948); see also *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 668-674 (1994) (remanding for further evidentiary proceedings relating to constitutionality of statute); *Askew* v. *Hargrave*, 401 U.S. 476, 478-479 (1971) (per curiam) (same); *Storer* v. *Brown*, 415 U.S. 724, 738-746 (1974) (same).

2. Because *Players* will offer this Court a more appropriate vehicle than the present case for deciding the constitutionality of Section 1304, the Court should take up that constitutional question in *Players* rather than in this case. The Court therefore should deny the petition in this case or, alternatively, hold the petition in abeyance pending the Court's eventual resolution of the constitutional question in *Players*. If the present petition is denied or held, petitioners will remain free to present this Court with their views regarding the constitutionality of Section 1304 through an *amicus*

filing in *Players*. And if the Court ultimately were to hold that Section 1304 is not constitutional, enforcement of the statute against casino gambling advertisements in casino States would be discontinued on a nationwide basis. As a result, denying this petition or holding it in abeyance will not materially prejudice petitioners (who have sought only prospective relief).

If the Court agrees with us that *Players* provides a preferable setting for resolution of the constitutionality of Section 1304, the remaining question is whether the Court should undertake review in *Players* now or, instead, defer review until after the Third Circuit has issued its decision. In our view, the principles governing this Court's exercise of its certiorari jurisdiction militate in favor of postponing review. Certiorari before judgment ordinarily is reserved for cases in which a compelling need for immediate action by this Court outweighs the benefits to be obtained from the normal appellate process. See Sup. Ct. R. 11. Although resolution of the existing (but narrow) circuit split regarding the constitutionality of Section 1304 is desirable, the constitutional issue does not have the manifest urgency that led the Court to issue certiorari before judgment in such cases as *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Nixon*, 418 U.S. 683 (1974). At the same time, postponing review until after the Third Circuit has issued its decision would ensure that this Court receives "the benefit [of] permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). Although two courts of appeals have addressed the constitutionality of Section 1304 already, neither court had the opportunity to evaluate the kind of evidentiary record that is before the Third Circuit in *Players*. See Petition for a Writ of

Certiorari at 11 & n.5 in *United States* v. *Valley Broadcasting Co.*, No. 97-1047. The Third Circuit's review of the record, and its evaluation of the First Amendment issue in the context of that record, can be expected to assist this Court in its own eventual deliberations.

Should the Court nevertheless prefer to take up the constitutionality of Section 1304 at this juncture, we are filing a petition for a writ of certiorari before judgment in *Players* to enable the Court to do so on the basis of a more suitable evidentiary record. See 28 U.S.C. 1254(1), 2101(e). Granting the petition in *Players* rather than the petition in this case would ensure that the "delicate duty" of passing on the constitutionality of an Act of Congress (*Walters*, 473 U.S. at 319) is not impeded by limitations in the record before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the petition should be held in abeyance pending disposition of the petition for a writ of certiorari before judgment in *Players*.

Respectfully submitted.

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