



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 6, 1999

Honorable Patricia Mack Bryan
Senate Legal Counsel
United States Senate
Washington, D.C. 20510-7250

Dear Ms. Bryan:

On June 14, 1999, the Supreme Court held in Greater New Orleans Broadcasting Association v. United States, 119 S. Ct. 1923 (1999), that 18 U.S.C. 1304, which prohibits radio and television broadcasts of advertisements concerning any "lottery, gift enterprise, or similar scheme," "may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal," without violating the First Amendment. 119 S. Ct. at 1926. In light of the Supreme Court's decision in Greater New Orleans, the Department of Justice has concluded that Section 1304, as currently written, may not constitutionally be applied to truthful advertisements for lawful casino gambling, whether the broadcaster who transmits the advertisement is located in a State that permits casino gambling or a State that prohibits it. The Department has therefore concluded that it can no longer defend the constitutionality of Section 1304 as applied in the pending appeal in Players International, Inc., et al. v. United States, et al., No. 98-5127 (3d Cir.). I am writing to inform you of that conclusion so that the Senate may determine whether to participate in the case to defend the constitutionality of the statute.

In Greater New Orleans, the constitutionality of Section 1304 was challenged by broadcasters located in New Orleans and other locations in Louisiana. The broadcasters sought permission to broadcast advertisements for lawful casino gambling activities in Louisiana and Mississippi. The Supreme Court reviewed the constitutionality of Section 1304 under the four-part "commercial speech" test of Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), and its progeny. See 119 S. Ct. at 1930. The government identified two governmental interests served by Section 1304: minimizing the social costs associated with casino gambling by reducing demand and assisting States that prohibit or otherwise restrict casino gambling activities. See 119 S. Ct. at 1931-1932. The Supreme Court determined that, as applied to truthful advertising for lawful casino gambling by broadcasters located in States that permit such gambling, Section 1304 does not directly advance either interest and is an impermissibly restrictive means of serving those interests. Id. at 1932-1936.

With respect to the government's interest in minimizing the social costs of casino gambling by reducing consumer demand, the Supreme Court concluded that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." 119 S. Ct. at 1933. The Court pointed to the various exceptions that Congress has engrafted onto Section 1304 over the years, particularly the exception for broadcast advertisements for Indian gambling (25 U.S.C. § 2720). The Court concluded that the other asserted governmental interest, that of assisting States that restrict casino gambling, "adds little to [the government's] case." 119 S. Ct. at 1935. First, the Court determined that the statutory exceptions that prevented Section 1304 from directly and materially advancing the federal government's interest in minimizing the social costs of casino gambling were equally inimical to the efforts of non-casino States. Ibid. Second, the Court concluded that Section 1304 "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate." Ibid.

Players International, Inc., like Greater New Orleans, involves a challenge to the constitutionality of Section 1304 as applied to truthful advertising for lawful casino gambling. The plaintiffs are the National Broadcasters Association (NAB), nine state broadcaster associations, two New Jersey radio stations, and a casino operator. The NAB and the state broadcasting associations represent broadcasters not only in States that permit private casino gambling, but also in States that do not. The plaintiffs assert that the application of Section 1304 to the broadcasting of truthful advertisements for lawful casino gambling violates the First Amendment, whether the statute is being applied in States that permit casino gambling or in non-casino States. The United States District Court for the District of New Jersey agreed with the plaintiffs, 988 F. Supp. 497, and the United States appealed that judgment to the United States Court of Appeals for the Third Circuit.

Greater New Orleans explicitly holds that Section 1304 violates the First Amendment as applied to truthful advertisements for lawful casino gambling that are broadcast in States that permit such gambling -- for example, advertisements for New Jersey casino gambling that are broadcast by television and radio stations in New Jersey. For purposes of Players International, Inc., the remaining question is whether Section 1304, as currently written, may be applied to broadcast advertisements for lawful private casino gambling that originate in States that do not permit such gambling -- for example, broadcast advertisements for New Jersey casino gambling that originate in Pennsylvania.

That question is not directly answered by the holding of Greater New Orleans, which is limited to "radio or television stations located in [a State] where such gambling is legal." 119 S. Ct. at 1926. However, although the Court's holding in Greater New Orleans's is confined to broadcasters located in casino-gambling States, the Court's reasoning indicates that Section 1304, as currently written, also cannot constitutionally be applied to broadcasters located in non-casino States. More specifically, as more fully explained in the enclosed brief which the Department

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filed today in the Third Circuit, the shortcomings in Section 1304 that led the Court to find it unconstitutional as applied to broadcasters located in States that permit casino gambling would also be present were the statute, as currently written, applied to broadcasters located in non-casino States.

The enclosed brief advises the Third Circuit that it is the position of the defendants that Section 1304 may not constitutionally be applied to broadcasters who transmit truthful advertisements for lawful casino gambling, whether the broadcasters are located in a State that permits casino gambling or a State that does not. The brief requests that the court of appeals refrain from dismissing the government's appeal for 90 days to afford Congress the opportunity to decide whether to participate in the case to defend the constitutionality of the statute.

Although the decision to file the enclosed brief is not, in the view of the Department of Justice, a determination "not to appeal any court decision affecting the constitutionality of an Act or joint resolution of Congress," 2 U.S.C. 288k, this letter is intended to discharge any obligation that the Attorney General may have under that statute.

Sincerely,



Seth P. Waxman

Enclosure

cc: Geraldine R. Gennet, Esq.
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