No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

PLAYERS INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission
Washington, D.C. 20554

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.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners here, who were the defendants in the district court and are the appellants in the court of appeals, are the United States of America and the Federal Communications Commission. The respondents here, who were the plaintiffs in the district court and are the appellees in the court of appeals, are Players International, Inc.; Players Lake Charles, LLC; Players Star Partnership; Southern Illinois Riverboat/Casino Cruises, Inc.; National Association of Broadcasters; Texas Association of Broadcasters; New Jersey Broadcasters Association; Mississippi Association of Broadcasters; Louisiana Association of Broadcasters; Missouri Broadcasters Association; West Virginia Broadcasters Association; Massachusetts Broadcasters Association, Inc.; New Hampshire Association of Broadcasters, Inc.; Illinois Broadcasters Association; Spring Broadcasting Limited Partnership (formerly known as H&D Broadcasting Limited Partnership); and Raritan Valley Broadcasting Co., Inc.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	12
Conclusion	25
Appendix A	1a
Appendix B	26a
Appendix C	28a
Appendix D	35a

TABLE OF AUTHORITIES

Cases:

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 25
Brown v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491 (1984) 15
Central Hudson Gas & Electric Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) 8-9, 10, 13, 17, 18, 20, 22
Champion v. *Ames*, 188 U.S. 321 (1903) 3, 4, 14, 16
FCC v. *American Broadcasting Co.*, 347 U.S. 284 (1954) 4, 5
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) 18
Fisher's Blend Station, Inc. v. *State Tax Comm'n*, 297 U.S. 650 (1936) 16
44 Liquormart, Inc. v. *Rhode Island*, 517 U.S. 484 (1996) 12, 17, 20
Horner v. *United States*, 147 U.S. 449 (1893) 5
McCullogh v. *Sociedad Nacional de Marineros*, 372 U.S. 10 (1963) 24
McElroy v. *Guagliardo*, 361 U.S. 281 (1960) 25
Mistretta v. *United States*, 488 U.S. 361 (1989) 23
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 13

Cases—Continued: Page

New Haven Inclusion Cases, 399 U.S. 392 (1970) 24
Posadas de Puerto Rico Assocs. v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) 15
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 13
Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 20
Turner Broadcasting Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 13
United States v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993) 3, 6, 17, 18, 19, 22
United States v. *Mendoza*, 464 U.S. 154 (1984) 24
United States v. *Nixon*, 418 U.S. 683 (1974) 23
Valley Broadcasting Co. v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998) 12, 13, 18, 22

Constitution, statutes, regulation and rule:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 3, 16
Amend. I 2, 3, 6, 8, 9, 10, 12, 13, 22
Act of July 27, 1868, ch. 246 § 13, 15 Stat. 196 3
Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 3
Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 3
Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 3
Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465 3
Charity Games Advertising Clarification Act, 1988, Pub. L. No. 100-625, 102 Stat. 3205 7
Communications Act of 1934, ch. 652, § 316, 48 Stat. 1088 (codified as amended at 18 U.S.C. 1304 4
Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*) 7
25 U.S.C. 2701(1) 6
25 U.S.C. 2702(1) 7
25 U.S.C. 2704-2706 7

Statutes, regulation and rule—Continued: Page

25 U.S.C. 2710-2713 7
25 U.S.C. 2710(b)(2)(B) 7
25 U.S.C. 2710(d)(1)(A)(ii) 7
25 U.S.C. 2710(d)(2)(A) 7
25 U.S.C. 2720 7
18 U.S.C. 1301 *et seq.* 3
18 U.S.C. 1304 .... *passim*
18 U.S.C. 1307(a)(1) 5
18 U.S.C. 1307(a)(1)(A) 6
18 U.S.C. 1307(a)(1)(B) 5-6
18 U.S.C. 1307(a)(2)(A) 7
18 U.S.C. 1307(a)(2)(B) 7-8
18 U.S.C. 1307(b)(1) 5, 6
18 U.S.C. 1961, note 15
39 U.S.C. 3001(a) 3
39 U.S.C. 3005 3
47 U.S.C. 312(a)(6) 4
47 U.S.C. 503(b)(1)(D) 4
47 U.S.C. 503(b)(2)(A) 4
47 C.F.R. 73.1211 4
Sup. Ct. R. 11 23

Miscellaneous:

134 Cong. Rec. (1988):
pp. 12,278-12,280 8
pp. 12,280-12,282 8
pp. 31,073-31,076 8
p. 31,075 8
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923 15
H.R. Rep. No. 1517, 93d Cong., 2d Sess. (1974) 5, 6
Message from the President of the United States Relative to the Fight Against Organized Crime, H.R. Doc. No. 105, 91st Cong., 1st Sess. (1969) 15
President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967) 15

Miscellaneous—Continued: Page

President's Comm'n on Organized Crime, *Interim Report to the President and the Attorney General -- The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* (1984) 15
S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 15
S. Rep. No. 1404, 93d Cong., 2d Sess. (1974) 5, 6
S. Rep. No. 446, 100th Cong., 2d Sess. (1988) 6-7

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OPINIONS BELOW

The court of appeals has not yet issued an opinion. The opinion of the district court (App., *infra*, 1a-25a) is reported at 988 F. Supp. 497.

JURISDICTION

The appeals in C.A. No. 98-5127 (3d Cir.) and C.A. No. 98-5242 (3d. Cir.) were docketed in the court of appeals on February 26, 1998, and May 19, 1998, respectively. The jurisdiction of this Court is invoked, prior to judgment in the court of appeals, under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATUTORY PROVISION INVOLVED

18 U.S.C. 1304 provides:

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

STATEMENT

This case involves a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the 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 District Court for the District of New Jersey held that Section 1304 violates the First Amendment as applied to the broadcasting of advertisements for lawful casino gambling in States that permit such gambling. The government has appealed the judgment of the district court to the Court of Appeals for the Third Circuit. During the pendency of that appeal, private parties in *Greater New Orleans Broadcasting Association, Inc.* v. *United States*, No. 98-387, filed a petition for a writ of certiorari presenting the same First Amendment question that is pending

before the Third Circuit. The government is filing this petition for certiorari before judgment because of the pending petition in *Greater New Orleans*.

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), this 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." 188 U.S. 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 Pub. L. No. 417, ch. 652, § 316, 48 Stat. 1088. The Federal Communications 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 503(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, Congress 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 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). 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 organization[s]," 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 businesses." *Id.* at 31,075.

3. a. Respondents include the National Association of Broadcasters, a number of state broadcasting associations, two New Jersey radio stations, and several corporations that operate gambling casinos. They brought this action against the United States and the FCC in October 1996.

Respondents contend that the application of Section 1304 to broadcast advertising for lawful commercial casino gambling in States that permit such gambling violates the First Amendment under the commercial speech doctrine of *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.

Respondents and the government filed cross-motions for summary judgment regarding the constitutionality of Section 1304 under the First Amendment. 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.

In support of its motion, the government submitted declarations and academic studies detailing 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 data showing 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 ineffectual. Finally, the government presented evidence regarding the superiority of advertising restrictions over other forms of government regulation as a means of curtailing compulsive gambling. See C.A. App. 47-441. Respondents did not submit contrary evidence on any of those issues.

b. On December 19, 1997, the district court issued an opinion and order entering summary judgment in favor of respondents and declaring that Section 1304 and the corresponding FCC regulation violate respondents' First Amendment rights. App., *infra*, 1a-27a.

The district court reviewed the constitutionality of Section 1304 under the First Amendment standards of *Central Hudson* and subsequent commercial speech decisions. See App., *infra*, 8a-9a. The court appears to have concluded, albeit with some reservations, that the government interests underlying Section 1304 are substantial ones. See *id.* at 9a-18a. The court nonetheless held that Section 1304 is unconstitutional under *Central Hudson* because, in the court's view, the statute does not directly advance the government's interests and is more restrictive than necessary to serve those interests. See *id.* at 18a-25a. Notwithstanding the evidence submitted by the government regarding the social and economic costs of casino gambling and the effects of broadcast advertising, the district court found that the government had not shown that Section 1304 significantly reduces gambling's social costs. *Id.* at 23a-24a. The court also reasoned that the statutory exceptions to Section 1304 "subvert[]" the ability of the statute to "protect[] society from the social problems promoted through gaming activities." *Id.* at 23a-24a. Finally, the court stated that Section 1304 "is [not] the only means by which the government can reduce the feared social ills" and that Section 1304 "is more extensive than

necessary to serve the government's interest in protecting non-casino states from the broadcasting of casino advertisements." *Id.* at 24a.

Following the district court's declaration that Section 1304 is unconstitutional, the FCC issued a public notice that it would suspend enforcement of its regulation in the District of New Jersey *pendente lite* but would not suspend enforcement elsewhere. The plaintiffs responded by filing a motion for entry of a nationwide injunction. On April 1, 1998, the district court denied the motion for injunctive relief. App., *infra*, 28a-34a. Its order stated that the court's original decision declaring Section 1304 unconstitutional "is final and ripe for appeal to the Third Circuit." *Id.* at 34a.

The government filed a timely notice of appeal from the district court's December 1997 order on February 13, 1998. App., *infra*, 35a-36a. After the district court's denial of injunctive relief, the government filed a second notice of appeal on April 24, 1998, covering both orders. App., *infra*, 37a-38a. The two appeals were docketed by the Third Circuit as C.A. No. 98-5127 and C.A. No. 98-5242, respectively. The appeals have been fully briefed and are currently awaiting oral argument in the Third Circuit.[1]

4. On July 30, 1998, during the course of appellate briefing in this case, the Court of Appeals for the Fifth Circuit issued its decision in *Greater New Orleans*. 149 F.3d 334. The Fifth Circuit held in *Greater New Orleans* that the application of Section 1304 to broadcast advertising of lawful casino gambling does not

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[1] Respondents have filed a motion to stay further appellate proceedings pending this Court's disposition of the petition for certiorari in *Greater New Orleans*, *supra*. On October 5, 1998, the Third Circuit referred that motion to the merits panel.

violate the First Amendment. The Fifth Circuit's decision conflicts with both the district court's decision in this case and *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998), in which the Ninth Circuit sustained an identical First Amendment challenge to Section 1304.

On September 2, 1998, the plaintiffs in *Greater New Orleans* filed a petition for a writ of certiorari (No. 98-387), asking the Court to resolve the conflict among the courts of appeals regarding the constitutionality of Section 1304. That petition is now pending before the Court. The government is filing a brief in opposition to the petition in *Greater New Orleans* in conjunction with the filing of this petition.

ARGUMENT

The constitutionality of 18 U.S.C. 1304 is an issue of substantial public importance that has divided two courts of appeals and is now pending before a third. The importance of the issue and the need to resolve the existing division among the courts of appeals make review by this Court appropriate. However, the recently filed petition in No. 98-387, *Greater New Orleans Broadcasting Ass'n* v. *United States*, does not provide a suitable vehicle for the Court to take up the constitutional question, because the record in *Greater New Orleans* was prepared prior to *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), and other recent decisions of this Court that have modified the contours of the commercial speech doctrine. The record in this case, in contrast, was prepared after *44 Liquormart* and is responsive to the constitutional reasoning reflected in the Court's most recent commercial speech decisions. In our view, the most prudent course of action for this Court would be to await the decision of the Third

Circuit in this case before taking up the constitutionality of Section 1304. However, if the Court wishes to proceed at this time, the Court should issue a writ of certiorari before judgment in this case to ensure that the Court is able to address the constitutional issue in the context of a more illuminating record than that in *Greater New Orleans*.

1. The district court in this case, like the Ninth Circuit in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (1997), cert. denied, 118 U.S. 1050 (1998), and in contrast to the Fifth Circuit in *Greater New Orleans*, held that Section 1304 does not satisfy the First Amendment requirements of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. That holding is incorrect. The government interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive.[2]

a. As noted above, Section 1304 serves two related but distinct government interests. The first is 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 demand for such gambling activities. When Congress enacted the original federal anti-lottery stat-

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[2] In applying the *Central Hudson* framework to Section 1304, the Court should not lose sight of the fact that the statute limits only radio and television broadcasts. This Court's cases "have permitted more intrusive regulation of broadcast speakers than of speakers in other media," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)), although the Court has not opined on the implications of the principles underlying those cases for the *Central Hudson* analysis.

utes, it acted on a judgment that lotteries and similar gambling enterprises impose pervasive social and economic costs on society. See *Champion* v. *Ames*, 188 U.S. 321, 356 (1903) (*Lottery Case*) (Congress concluded that "the widespread pestilence of lotteries * * * infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."). Section 1304 and related federal gambling statutes (see pp. 3-5, *supra*) reflect Congress's continuing judgment that gambling contributes to a host of social and economic problems.

In the proceedings before the district court, the government submitted declarations and other materials documenting the social and economic costs of gambling activities, particularly commercial casino gambling. See C.A. App. 47-97, 111-376, 379-402, 438-441. The record shows that many of the costs associated with gambling activities involve compulsive gambling, a recognized psychological disorder that is referred to clinically as "pathological gambling." *Id.* at 181-184. From 3 million to 10 million Americans are believed to be compulsive gamblers. *Id.* at 183, 185, 192. Estimates of the economic costs of compulsive gambling amount to tens of billions of dollars annually, and the social costs of compulsive gambling—such as spousal and child abuse, divorce, depression, and even suicide—are equally serious. *Id.* at 193, 208-210, 272-274, 292, 309, 310, 321, 335-337, 341, 359-366, 388, 397-398. Because gambling casinos offer "continuous play" gambling devices such as slot machines, they are particularly conducive to compulsive gambling behavior, and compulsive gamblers account for a disproportionate share of casino revenues. *Id.* at 249, 257, 270, 383, 392-393, 399-400.

In addition to providing both a stimulus and an outlet for compulsive gambling, casino gambling has traditionally been a lure for organized crime and other kinds of criminal activity. See, *e.g.*, Congressional Statement of Findings and Purpose preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; Message from the President of the United States Relative to the Fight Against Organized Crime, H.R. Doc. No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Commission on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984). The record presented by the government in this case extensively documents the relationship between criminal activity and gambling, particularly casino gambling. See C.A. App. 47-97, 106-179, 385-386, 389-391.

In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), this Court had "no difficulty" in concluding that the governmental interest in minimizing the social and economic costs of gambling, particularly casino gambling, is a substantial one. See *id.* at 341. Although the Court has subsequently held that the use of commercial speech restrictions to further that interest requires closer scrutiny than *Posadas* employed, see p. 20, *infra*, the Court has never cast any doubt on *Posadas*'s assessment of the underlying government interest in reducing participation in casino gambling, and the record in this case amply confirms the continuing force of that assessment.

The other government interest underlying Section 1304 is an interest in assisting States that prohibit or otherwise restrict gambling activities. Broadcast advertising is inherently interstate in nature, see, *e.g.*, *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U.S. 650, 655 (1936), and States lack both the legal and the practical ability to exclude broadcast advertising originating outside their borders. Federal intervention is therefore required if non-gambling States are to be able to shield their residents from solicitations broadcast in neighboring States that allow gambling.

Nearly a century ago, in the *Lottery Case*, this Court endorsed Congress's use of its powers under the Commerce Clause to prevent "the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, [from being] overthrown or disregarded by the agency of interstate commerce." 188 U.S. at 357. Section 1304 represents a continuation of that effort. The federal government's interest in assisting anti-gambling States is no less substantial than its independent interest in reducing the social and economic costs of casino gambling and similar gambling activities.

b. Section 1304 directly advances both of the foregoing government interests. It furthers the government's interest in minimizing the social and economic costs of gambling activities by depriving commercial gambling casinos of one of the most potent means for stimulating public demand and participation. And it furthers the government's interest in assisting States that prohibit or restrict gambling by shielding them from broadcast advertising originating in adjacent or nearby States that permit such activities.

This Court has long recognized that promotional advertising directly increases public demand for adver-

tised products and services. In *Central Hudson* itself, "the Court recognized * * * that there was 'an immediate connection between advertising and demand for electricity.'" *44 Liquormart*, 517 U.S. at 500 (quoting *Central Hudson*, 447 U.S. at 569). And in *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), the Court specifically concurred with Congress's "commonsense judgment" regarding the link between broadcast lottery advertising and lottery participation. As the Court explained there, "[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced." *Id.* at 434. Indeed, the connection between advertising and demand is the raison d'être of the advertising industry.

The district court understood *44 Liquormart* as having rejected the Court's past reliance on the immediate connection between promotional advertising and demand. App., *infra*, 19a. *44 Liquormart*, however, involved a different question: the use of restrictions on *price* advertising to curtail demand. In *44 Liquormart*, Rhode Island contended that restricting retail price advertising would reduce price competition; that reduced price competition would eventually lead to higher prices; and that higher prices would lead to lower demand. 517 U.S. at 504-505. Justice Stevens and three other Justices concluded that this indirect sequence of causal links was not sufficient, in the absence of "any evidentiary support whatsoever," to establish that the advertising ban materially reduced liquor consumption. *Id.* at 505-506 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). However, neither Justice Stevens's opinion nor any of the other opinions in *44 Liquormart* questions the Court's re-

liance on the "direct connection" between promotional advertising and demand in *Central Hudson* and *Edge*, and none of the opinions suggests that an evidentiary showing is required to confirm that connection.

In any event, the evidentiary record in this case does confirm that restrictions on promotional advertising directly advance the government's interest in reducing public demand. Experts in gambling research and compulsive gambling testified by declaration that promotional advertising increases participation in gambling activities and compulsive gambling. C.A. App. 381, 400. They also testified that broadcast advertisements are a uniquely potent means of stimulating gambling activity because, *inter alia*, they "affect multiple senses and are extremely pervasive." *Id.* at 381, 391, 400. That testimony is consistent with this Court's recognition that broadcasting is "a uniquely pervasive presence in the lives of all Americans," one that "confronts the citizen, not only in public, but also in the privacy of the home." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). The record also contains evidence from the experience of state lotteries indicating that curtailing advertising results in a significant corresponding reduction in gambling activity. C.A. App. 382-383. The record thus supports the common sense conclusion that, by prohibiting commercial casinos from promoting their gambling activities over the airwaves, Section 1304 advances the government's interest in reducing the social costs associated with gambling activities.

c. The district court in this case and the Ninth Circuit in *Valley Broadcasting* also concluded that the exceptions to Section 1304 (see pp. 5-8, *supra*) prevent the statute from directly advancing the government's interests. That conclusion, however, cannot be reconciled with this Court's decision in *Edge*. In *Edge*,

this Court rejected a First Amendment challenge to the very statute at issue in this case, brought by a North Carolina radio station that wished to broadcast advertisements for the Virginia state lottery. The radio station argued, *inter alia*, that the statute was ineffective because it permitted lottery advertisements to be broadcast in lottery States, thereby exposing residents of adjoining non-lottery States to lottery advertising. This Court rejected the station's claim, holding that "the government may be said to advance its purpose by *substantially reducing* lottery advertising, even where it is not wholly eradicated." 509 U.S. at 434 (emphasis added).

The Court's reasoning in *Edge* applies with equal force here. The record in this case shows that commercial casino gambling accounts for 40 percent of all gross gambling revenues in the United States—$18.0 billion in gross revenues out of a total of $44.4 billion for all forms of gambling in 1995. C.A. App. 378. In comparison, state lotteries account for approximately a third of gross gambling revenues, Indian gambling accounts for less than 10 percent, and charitable gambling accounts for less than 5 percent. *Ibid.* By closing the airwaves to gambling advertising by commercial casinos that account for 40 percent of all gambling in the United States, Section 1304 "substantially reduce[s]" gambling advertising.

Moreover, commercial casino gambling is more likely to lead to adverse social costs than the kinds of gambling covered by the statutory exceptions to Section 1304. As noted above, the record below shows that casino gambling, and particularly slot machines, are associated with a higher incidence of compulsive gambling than other forms of gambling. C.A. App. 392. In addition, although Indian casinos may offer the same

kinds of gambling activities as non-Indian commercial casinos, the vast majority of Indian lands are located in relatively remote and sparsely populated areas, and many regions of Indian land have no casino gambling at all. *Id.* at 406-407. Private commercial casinos are far more likely to be situated within or near major urban centers, such as New Orleans and Las Vegas, so that broadcast advertising for private casinos would reach a large audience that could readily act on advertised inducements to gamble. Thus, unlike the statute struck down by this Court in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), Section 1304 is not a statute with exceptions that "ensure[] that the * * * ban will fail to achieve [its] end." *Id.* at 489.

d. The final inquiry under *Central Hudson* is whether Section 1304 is "more extensive than is necessary" to serve the government's interests. In *44 Liquormart*, a majority of the Court appears to have held that restrictions on commercial speech are impermissible if regulatory alternatives that do not involve speech restrictions would be more effective in accomplishing the government's goals. See 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.). Here, however, the record shows that restricting broadcast advertising is a uniquely well-suited means of dealing with one of the central problems associated with casino gambling, the problem of compulsive gambling.

The record shows that it is difficult, if not impossible, for the government to prevent or discourage compulsive gambling through direct regulation of gambling activities. Raising the "price" of casino gambling through increased taxation or other regulatory means is unlikely to have a comparable impact on compulsive

gambling behavior, because one of the defining characteristics of compulsive gamblers is their willingness to continue gambling in the face of growing and ultimately ruinous financial losses. C.A. App. 401. Compulsive gambling also does not lend itself readily to direct restrictions on access, because persons suffering from compulsive gambling typically lack the outward physical symptoms associated with other forms of addiction. *Id.* at 335, 401. Nor can compulsive gambling be combatted successfully through educational programs or other kinds of affirmative government counter-speech: compulsive gamblers place themselves and others in jeopardy not because they are ignorant of the risks of gambling, but because they suffer from an impulse control disorder that prevents them from behaving rationally in the face of known risks. *Id.* at 181-184, 302.

In contrast, advertising restrictions like those found in Section 1304 hold out the promise of directly affecting compulsive gambling behavior. As noted at page 18 above, the record in this case indicates that broadcast advertising of casino gambling would directly contribute to compulsive gambling by reaching into the homes of current and potential compulsive gamblers and giving them immediate and repeated exposure to the sights and sounds of gambling, presented in especially attractive and persuasive ways. Prohibiting broadcast advertisements for casino gambling addresses the problem of compulsive gambling both at the "front end," by minimizing the exposure of susceptible individuals, and at the "back end," by eliminating an adverse influence on persons recovering from compulsive gambling. No non-speech regulatory alternative offers comparable benefits in terms of reducing the risks and costs of compulsive gambling.

Section 1304 is also a narrowly tailored means of advancing the federal government's interest in assisting non-gambling States. Because of the inherently interstate nature of broadcast signals, a more limited restriction on broadcast advertising would necessarily be less effective in insulating non-gambling States. And given the interstate character of broadcast transmissions in general, it is irrelevant to the constitutionality of Section 1304 that the signals of particular stations might not cross state lines. See *Edge*, 509 U.S. at 430 (Under the fourth component of the *Central Hudson* test, "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.").

2. For the foregoing reasons, the district court in this case and the Ninth Circuit in *Valley Broadcasting* erred in holding that Section 1304 violates the First Amendment as applied to advertising for lawful casino gambling. In contrast, the Fifth Circuit reached the correct result in *Greater New Orleans* when it rejected the same First Amendment challenge to Section 1304.

Because the circuits are divided over the constitutionality of Section 1304, and because the scope of the federal government's authority to regulate broadcast gambling advertising is a matter of substantial public importance, review of the constitutional question by this Court is warranted. This Court has two petitions before it that present that question: this petition and the petition filed by the television and radio station plaintiffs in *Greater New Orleans*.

As we explain in detail in our opposition to the petition in *Greater New Orleans*, the limited evidentiary record in that case makes it an unsuitable vehicle

for this Court to resolve the constitutionality of Section 1304.[3] See Br. in Opp. at 16-20 in No. 98-387 (explaining that the principle that courts should not decide constitutional questions without a factual record adequate to illuminate the constitutional issues counsels against review in that case). In contrast, the evidentiary record in this case was developed after *44 Liquormart* and the Court's other intervening commercial speech decisions and was prepared in direct response to those decisions. This case contains a substantially more illuminating record than *Greater New Orleans* regarding how Section 1304 works and what it accomplishes. Accordingly, this case is more appropriate than *Greater New Orleans* as a vehicle for this Court to take up the constitutionality of Section 1304.

As noted above, the government's appeal in this case is currently pending before the Third Circuit, where the appeal has been fully briefed and is awaiting oral argument. In ordinary circumstances, the government would not suggest that the Court issue a writ of certiorari prior to judgment in a case like this one. Certiorari before judgment normally 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 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 cases such as *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Nixon*, 418 U.S. 683 (1974). Moreover, postponing review until after the Third

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[3] We are providing a copy of our brief in opposition in *Greater New Orleans* to respondents in this case.

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 Br. in Opp. at 18-19 in *Greater New Orleans Broadcasting Ass'n.* v. *United States*, No. 98-387; 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. In our view, the preferable course would be for the Court to await the Third Circuit's resolution of this case before taking up the constitutionality of Section 1304.

Nevertheless, because of the pending petition in *Greater New Orleans*, this Court may choose to address the constitutionality of Section 1304 at the present time. In that event, the Court should grant certiorari before judgment in this case rather than, or at the very least in addition to, granting certiorari in *Greater New Orleans*. Doing so would ensure that the Court's review of the constitutional issue is not unnecessarily impeded by limitations in the record before this Court.[4]

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[4] On various occasions, the Court has granted certiorari prior to judgment in one case when another case before the Court presented the same or similar issues and the Court's resolution of those issues would benefit from concurrent review of the case pending in the court of appeals. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCullogh* v. *Sociedad Nacional*

CONCLUSION

The petition for a writ of certiorari before judgment should be granted if the Court concludes that it should undertake at this time to resolve the existing conflict among the courts of appeals on the question presented.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission

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de Marineros, 372 U.S. 10, 12 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283 (1960); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954).