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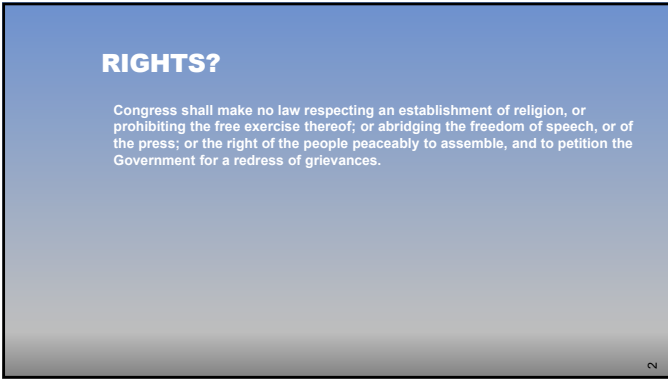
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### COMMERCIAL SPEECH

What is "commercial speech?" (according to the USSC)  
• "expression related solely to the economic interests of the speaker and its audience" – Central Hudson 447 U.S. 557

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### COMMERCIAL SPEECH

What is the test for determining whether government prohibition or regulation is unwarranted?

- Part 1
  - Does the speech concern lawful conduct or is it misleading?
- Part 2
  - Does the restriction serve a legitimate government interest?
- Part 3
  - Does the restriction directly advance the government's stated interest?
- Part 4
  - Is the regulation or restriction no broader than necessary to serve the government's stated interest?

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### PUFFERY



[https://youtu.be/b\\_1ASmweXYs?si=CZobYem-89nEmjZ4](https://youtu.be/b_1ASmweXYs?si=CZobYem-89nEmjZ4)

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**PUFFERY**



[https://www.youtube.com/watch?v=SNOvNrZ6S\\_E](https://www.youtube.com/watch?v=SNOvNrZ6S_E)

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**POSADAS**

Court willing to accept arguments of the state without requirement for evidence.

The power to prohibit gambling includes the lesser included power to allow gambling but limit speech about the activity.

Court affirms Puerto Rico's prohibition on casino advertising that may reach locals.

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**EDGE**

Reaffirms the notion that deference is given to the state regarding a legitimate government interest and whether that interest is advanced by the speech limitation.

Whether the government's policy is actually advanced by the limitation on speech is viewed on the whole and not as it applies to a particular litigant. Thus, even though in that case the restriction made no actual impact at advancing the government's interest, the restriction was upheld.

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### 44 LIQUOR MART

First, it is a fractured decision with a different combination of judges supporting different elements of the opinion.

The Court no longer will assume a legislative body has a substantial interest without proof. It also will no longer assume the restriction serves that interest merely because a legislative body is reasonable in making such an assertion. Therefore, proof will be required to show that the restriction serves to advance the government's stated substantial interest.

This opinion also notes that the Posadas case decision was an error. The Court rejects the greater power of permitting an activity includes the lesser included power of limiting speech about the activity.

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### COMMERCIAL SPEECH

Postal lottery prohibitions were expanded by the 1934 Communications Act  
18 U.S.C. §1304 Broadcasting lottery information  
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.

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### COMMERCIAL SPEECH

FCC Regulations  
47 CFR §73.1211 Broadcast of lottery information.  
(a) No licensee of an AM, FM, television, or Class A television broadcast station, except as in paragraph (c) of this section, shall broadcast 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...

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### COMMERCIAL SPEECH

FCC Interpretations – The Exceptions

- State run lotteries
  - Broadcast within the state
  - Broadcast in an adjacent stat that also had a legal lottery
  - Any other state with a legal lottery
- Non-profit games
- Horse Racing
- Poker Tournaments (based on skill)
- Native American Casinos as part of IGRA

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### COMMERCIAL SPEECH



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### COMMERCIAL SPEECH

Greater New Orleans

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## COMMERCIAL SPEECH

### Greater New Orleans

#### The Facts - The Timeline

- On February 24, 1994 the Greater New Orleans Broadcasting Association, a trade association of New Orleans-based radio and television stations, challenged the constitutionality of a federal law banning radio and television advertisements of casino gaming.
- On November 29, 1995, the 5th U.S. Circuit Court of Appeals affirmed the federal district court decision, ruling that the federal ban on broadcast advertisements of casino gaming does not violate the First Amendment.
- On April 29, 1996 Greater New Orleans filed an appeal to the U.S. Supreme Court.
- On October 7, 1996 the U.S. Supreme Court vacated the 5th Circuit's decision. It ordered the 5th Circuit to apply the principles articulated by the high court in 44 Liquormart v. Rhode Island.
- On July 30, 1998 the 5th U.S. Circuit Court of Appeals ruled again that the federal ban on casino gaming advertisements does not violate the First Amendment.
- On September 7, 1998 Greater New Orleans Broadcasting Association, Inc. filed a petition for writ of certiorari to the U.S. Supreme Court, asking the high court to review the 5th Circuit's decision.
- On January 15, 1999, the U.S. Supreme Court agreed to hear the case.
- On April 27, 1999, the U.S. Supreme Court heard oral arguments in the case.

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## COMMERCIAL SPEECH

### Greater New Orleans

#### The Facts

- Plaintiff is an association of broadcasters in Louisiana that operate under FCC licenses
- Exemptions exist for advertising for many types of gambling
  - Indian Gaming
  - State Lotteries
  - Horse Racing... etc.
- Plaintiff wants to take ads for Louisiana and Mississippi private casinos
- Some signals may travel to Texas and Arkansas that have no legal private casino gaming

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## COMMERCIAL SPEECH

### Greater New Orleans

#### The Facts

- "Petitioners brought this action against the United States and the FCC in the District Court for the Eastern District of Louisiana, praying for a declaration that § 1304 and the FCC's regulation violate the First Amendment as applied to them, and for an injunction preventing enforcement of the statute and the rule against them."

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## COMMERCIAL SPEECH

### Greater New Orleans

- Does the Court use Central Hudson?
  - "In this case, there is no need to break new ground. Central Hudson, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

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## COMMERCIAL SPEECH

### Greater New Orleans

- Part 1 – Legal Subject Matter
  - "Their content is not misleading and concerns lawful activities"

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## COMMERCIAL SPEECH

### Greater New Orleans

- Part 2 – Whether the asserted governmental interest served by the restriction is substantial
  - (1) reducing the social costs associated with "gambling" or "casino gambling," and (2) assisting States that "restrict gambling" or "prohibit casino gambling" within their own borders.

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## COMMERCIAL SPEECH

### Greater New Orleans

- Part 2 – Whether the asserted governmental interest served by the restriction is substantial
  - “We can accept the characterization of these two interests as “substantial,” but that conclusion is by no means self-evident.”
  - “the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits”
  - “we cannot ignore Congress’ unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General.”

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## COMMERCIAL SPEECH

### Greater New Orleans

- Part 3 – whether the speech restriction directly and materially advances the asserted governmental interest
  - “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”

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## COMMERCIAL SPEECH

### Greater New Orleans

- Part 4 – Whether the speech restriction is not more extensive than necessary to serve the interests that support
  - “The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—“a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”

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### COMMERCIAL SPEECH

- Greater New Orleans
  - So what happens....

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### COMMERCIAL SPEECH

- Greater New Orleans
  - As applied to petitioners' case, § 1304 cannot satisfy these standards.
  - State Interest # 1 - reducing the social costs associated with "gambling" or "casino gambling."
  - "any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling"
  - "The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."

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### COMMERCIAL SPEECH

- Greater New Orleans
  - "Accordingly, respondents cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and non-misleading information about lawful conduct."

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### SUMMARY

DOJ Response

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### SUMMARY

DOJ Response

ENFORCEABILITY OF 18 U.S.C. § 1302  
Application of 18 U.S.C. § 1302 to prohibit the mailing of truthful advertising concerning lawful gambling operations (except as to state-operated lotteries in some circumstances) would violate the First Amendment. Accordingly, the Department of Justice will refrain from enforcing the statute with respect to such mailings.

LETTER TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES September 25, 2000

This is to inform you of the Department of Justice's determination that, in light of governing Supreme Court precedent, the Department cannot constitutionally continue to apply 18 U.S.C. § 1302 to prohibit the mailing of truthful information or advertisements concerning certain lawful gambling operations.

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### NEVADA

5.011 Grounds for disciplinary action. The board and the commission deem any activity on the part of any licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:

- Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and offensiveness, including, but not limited to, advertising that is false or materially misleading.

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**NEVADA**

At the Hard Rock Hotel, we believe in your Monday Night Rights: Large quantities of prescription stimulants. Having wives in two states. The Big Score Football on Monday nights. . . . Tell your wives you are going; if they are hot, bring them along.

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**NEVADA**

The Hard Rock Story

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**NGC REGULATION 5.011**

Grounds for disciplinary action under 5.011 include:

5.011(1)

Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.

5.011(4)

Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness, including, but not limited to, advertising that is false or materially misleading.

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In 2004, the Gaming Control Board tested that power when it filed a complaint against the Hard Rock Hotel.

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### THE COMPLAINT: COUNT 1



Ad in Las Vegas Weekly:  
"There's always a temptation to cheat"

Board:  
"This ad conveys that cheating at gaming, and lounging on piles of gaming cards and chips"

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### THE COMPLAINT: COUNT 2

Las Vegas Weekly magazine ad:

"At the Hard Rock Hotel, we believe in your Monday Night Rights: Large quantities of prescription stimulants. Having wives in two states. The Big Score Football on Monday nights. . . . Tell your wives you are going; if they are hot, bring them along."

The Board:

This ad conveys that possession of large quantities of prescription stimulants and having more wives than is legal is acceptable activity among Hard Rock's patrons in violation of NGC Reg. 5.011(1) and 5.011(4).

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### THE COMPLAINT: COUNT 3

Board:  
 Following a 2002 disciplinary action, the Hard Rock represented it would take certain remedial actions, including review by its Compliance Officer and Committee of any "questionable elements" in its advertising. The ads described herein were not submitted to either. This failure demonstrates that the Hard Rock has "persistently failed to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry in violation of NCC Reg. 5.011(1).

 Two photographs of billboards are shown. The left billboard features a woman in a red dress and the text "GET READY TO BUCK ALL NIGHT". The right billboard features a woman in a bikini and the text "Looser than your girlfriend." and "The Sign at Hard Rock Casino".

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### THE HARD ROCK'S COMMENTARY

 A cartoon illustration shows a squirrel and a rabbit. The squirrel is holding a sign that says "ANOTHER CLEAN & INOFFENSIVE BILLBOARD". Below the illustration, it says "FROM YOUR FRIENDS AT THE HARD ROCK HOTEL & CASINO A PETER DORSTON HOTEL".

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### HARD ROCK

The Hard Rock found that this regulation was in violation of Its 1st Amendment rights...

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### THE HARD ROCK'S RESPONSE...

"Regulation 5.011(4) is vague, ambiguous and overbroad, therefore unenforceable in the context for which enforcement is sought"  
"The advertisements described in the Complaint are forms of commercial speech protected by the First Amendment"  
The "Compliance Overview" cited by the Board did not address the type of advertising at issue here (it was meant to help employees deal with potentially objectionable 'contests and promotions') and was "not equivalent to a regulatory requirement."

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### THE HARD ROCK'S RESPONSE

The matter was settled with a \$300,000 fine and changes to the compliance plan and procedures for approving advertising.

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### OTHER JURISDICTIONS

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### OTHER JURISDICTIONS

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### OTHER JURISDICTIONS

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**OTHER JURISDICTIONS**

<https://www.youtube.com/watch?v=piruMbtUhl>

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**OTHER JURISDICTIONS**

<https://www.adelaidenow.com.au/news/sportsbet-2019-ad/video/6ff5ac61199a9c84f2fcb3ced4eb71c>

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**OTHER JURISDICTIONS**



<https://www.youtube.com/watch?v=mZnoExfvriA>

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### US SPORTS BETTING - AGA

- Responsible Marketing Code for Sports Wagering
- Respecting the Legal Age for Sports Wagering
  - No sports betting message should be designed to appeal primarily to those below the legal age for sports wagering by depicting cartoon characters or by featuring entertainers or music that appeal primarily to audiences below the legal age within the jurisdiction. Nor should any message suggest or imply that underage persons engage in sports wagering.
  - Sports wagering advertisements should not be placed in media outlets (including social media) that appeal primarily to those below the legal age for sports wagering, nor should they be displayed at an event venue where most of the audience at many of the events at the venue is reasonably expected to be below the legal age for sports wagering.
  - No sports wagering messages—including logos, trademarks, or brand names—should be used or licensed for use on clothing, toys, games, or game equipment intended primarily for persons below the legal age for sports wagering. To the extent that promotional products carry sports wagering messages or brand information, AGA members and their employees will use commercially reasonable efforts to distribute them only to those who have reached the legal age for sports wagering.
  - Sports wagering should not be promoted or advertised in college or university-owned news assets (e.g., school newspapers, radio or television broadcasts, etc.) or advertised on college or university campuses.

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### US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
  - Respecting the Legal Age for Sports Wagering
  - Supporting Responsible Gaming
  - Controlling Digital Media and Websites
  - Monitoring Code Compliance
  - Compliance Process

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### US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
  - Supporting Responsible Gaming
    - Messages will not promote irresponsible or excessive participation in sports wagering.
    - Each message will contain a responsible gaming message, along with a toll-free help line number where practical.
  - No message should suggest that social, financial or personal success is guaranteed by engaging in sports wagering. Nor should any message imply or suggest any illegal activity of any kind.
  - Messages should adhere to contemporary standards of good taste that apply to all commercial messaging, as suits the medium or context of the message.

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### US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
  - Controlling Digital Media and Websites
    - Messages placed in digital media—including third party internet and mobile sites, commercial marketing emails or text messages, social media sites, and downloadable content—shall comply with all applicable provisions of this Code concerning the content of such messages.
    - Each website that includes advertising or marketing materials should include a responsible gaming message and a link to a site that provides information about responsible gaming and responsible gaming services.
    - Owned websites or profiles that include sports betting content, including social media pages and sites, shall include a reminder of the legal age for sports wagering. Age affirmation mechanisms, utilizing month, day, and year of birth, will apply before a user can gain access to any page where individuals can engage in gambling.

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### US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
  - Controlling Digital Media and Websites
    - Owned websites will include geolocation mechanisms on those pages where individuals can engage in gambling, in order to screen any individuals who reside in jurisdictions that have not legalized sports wagering.
    - User-generated content on an owned site or web page will be monitored and moderated on a regular basis for compliance with the provisions of this code.
    - Digital marketing communications will respect user privacy and comply with all applicable legal privacy requirements including those governing consent. All such messages targeting an individual recipient will be clearly identified as originating from the sports betting operator or otherwise attributable to the operator. In addition, each such message sent via email or text message will provide the option therein of opting out or unsubscribing.
    - Owned websites shall disclose to users—in their terms of use or other policy statements—any practices of the website that involve sharing user information with third parties unrelated to the operator sponsoring the site.

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### US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
  - Respecting the Legal Age for Sports Wagering
  - Supporting Responsible Gaming
  - Controlling Digital Media and Websites
  - Monitoring Code Compliance
  - Compliance Process

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### US SPORTS BETTING - AGA



<https://www.youtube.com/watch?v=m6iUjaaEBe8>

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### LEAGUES



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### LEAGUES



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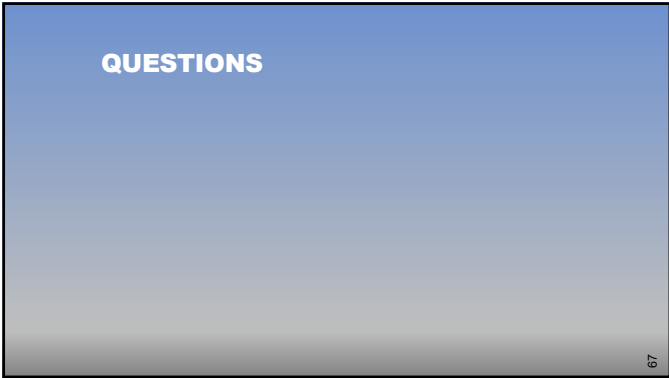
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