

1 CHAIRPERSON JAMES: Steve.

2 MR. BOOKSHESTER: Thank you.

3 My name is Steve Bookshester. I'm Associate General
4 Counsel of the National Association of Broadcasters, where I've
5 been for the past 15 years. Prior for that I worked for a while
6 at the Federal Communications Commission, and prior to that I was
7 with then Congresswoman Barbara Mikulski, a woman who may be very
8 familiar with the word "jobs." Commissioner Wilhelm, we worried
9 about them all the time when I was working for Ms. Mikulski.

10 COMMISSIONER WILHELM: A great lady.

11 MR. BOOKSHESTER: Yes, indeed.

12 And what I would like to do first is bring to your
13 attention if you haven't read it yet the paper which all
14 advertising groups and broadcasters had prepared by Cam Dehor and
15 Davis Wright in Seattle and John Walsh of the Shadwalter firm in
16 New York. If you're looking for bullets, the first two pages are
17 bullet points. It's an excellent piece of work. Cam, to let you
18 know, is the author with Judge Robert Sack of the Second Circuit
19 of the forthcoming treatise on commercial speech, which is going
20 to be published by the Practicing Law Institute.

21 So we went out to get some of the finest people in the
22 country in this area, and we hope you'll pay some attention to
23 the work that we provided to you.

24 Secondly, we might note that we caucused in your break
25 and decided that all of us attorneys -- none of us were experts
26 on the speech rights of states. The regulation runs against us,
27 the federal statutory regulation now. We're not permitted to
28 broadcast or print in newspapers. So those are First Amendment
29 issues, the issues of the state right to speak, although we

1 hypothesize that they're substantial, while not as great as that
2 of individuals or corporations. It's one that we're really not
3 expert on.

4 And so with your permission, we would like to find
5 someone who knows more about this than all of us in the room do
6 and submit to you an additional paper on that issue. It's one
7 we're not really familiar with.

8 CHAIRPERSON JAMES: Thank you, and we will distribute
9 it to all Commissioners.

10 COMMISSIONER BIBLE: Now, specifically what question
11 are you going to address?

12 MR. BOOKSHESTER: We're going to address the question
13 Commissioner Wilhelm raised about the --

14 COMMISSIONER BIBLE: Applicability of the First
15 Amendment to --

16 MR. BOOKSHESTER: Well, the First Amendment clearly
17 doesn't apply to the states, but they clearly also have rights to
18 speak, and the question is, you know, where do they derive? We
19 think they derive from the Tenth Amendment. There is probably
20 not a whole lot of case law on it, but we will at least look at
21 it. Since you're interested in that, we'll be happy to take a
22 look at the issue and bring something back to you. What we know
23 is what we don't know.

24 COMMISSIONER WILHELM: I think that would be helpful.
25 Clearly, a state could prohibit itself from doing that stuff.

26 MR. BOOKSHESTER: Oh, certainly, certainly, and the
27 question is whether -- I mean, I take it your question was
28 whether anybody else could.

29 COMMISSIONER WILHELM: Yeah.

1 MR. BOOKSHESTER: And our answer is, you know, probably
2 not, but we don't know, and so we will do our best to bring
3 something back to you.

4 COMMISSIONER WILHELM: By extension, could you take a
5 look at the issue as to whether some of the requirements of the
6 FTC's oversight authority on advertising practices could be
7 extended to a state government? A little bit different question.

8 MR. BOOKSHESTER: I think we will look at it if you
9 would like us to.

10 COMMISSIONER WILHELM: Thank you.

11 MR. BOOKSHESTER: Broadcasting is solely an advertiser
12 supported media. Over the years, broadcasting derives virtually
13 all of its revenues from advertising. Advertising is our life's
14 blood.

15 False, misleading, or deceptive ads may harm our
16 viewers and lose our viewers and provide a bad environment in
17 which other advertising running truthful ads seek to advertise,
18 and so we have no interest in presenting false, misleading or
19 deceptive advertising. We don't run it, to the best of our
20 ability. We're not looking for it.

21 The current state of the law, as you know, is defined
22 by the explications of the Central Hudson case. As worked out in
23 the 44 Liquor Mart v. Rhode Island Supreme Court decision of
24 1996, if a product is legal, as indeed gaming is and as indeed
25 lotteries are, then for the state to regulate, the state/federal
26 government needs to have a substantial interest in regulating
27 speech. That regulation must directly advance the state's
28 interest to a material degree, and it can't just be hypothesized.
29 It has to be proven.

1 The burden is on the state to prove it. The ban must
2 be no more extensive than necessary to serve the state's
3 objectives. There must be a reasonable fit between the
4 regulatory purpose and the goal, and mere legislative judgment is
5 not acceptable.

6 Under that decision, particularly as the Court has set
7 it forth in 44 Liquor Mart, I think the state or federal
8 government would be hard pressed to ban the advertising of casino
9 gaming, although as you know that's an unsettled issue which the
10 Court is finally going to finish off this spring or is to ban the
11 advertising of lotteries, at least as to us, or to ban the
12 advertisers' advertising of other gaming oriented goods.

13 It was at one point -- back in 1986, there was a
14 Supreme Court case called Pasada Steve Puerto Rico (phonetic) v.
15 Tourism of Puerto Rico. The Pasadas, the inns were actually the
16 Condado Holiday Inn, and the question at that time was that the
17 state of Puerto Rico or the Commonwealth of Puerto Rico banned
18 advertising directed to residents of Puerto Rico, but did not ban
19 advertising, including advertising in Puerto Rico, directed to
20 the residents of other locales.

21 The Supreme Court's opinion in Pasadas held, among
22 other things, that the ability of Puerto Rico to ban all gaming
23 included within it the ability to ban advertising for the gaming,
24 although please note that this was not a complete ban. You could
25 advertise to tourists. You just couldn't advertise to locals.

26 That created what many thought was a vice exception in
27 commercial speech law, which has clearly been eliminated if ever
28 it existed by the Supreme Court's decision in 44 Liquor Mart. In
29 44 Liquor Mart, decided in 1996, nine Supreme Court Justices

1 adhered to the view that there was no vice exception; there is no
2 vice exception, however you may choose to define "vice." There
3 is no vice exemption under the First Amendment for commercial
4 speech; that if the activity that's being advertised is legal,
5 the state cannot choose to ban the advertising for the activity.

6 Now, this is not an issue of taste or likes, as Justice
7 Thomas has said. The government may not keep users of a legal
8 product or service ignorant in order to manipulate their choices
9 in the marketplace, and what I'd like to do is just briefly
10 review what Justice Stevens wrote in the 44 Liquor Mart case.

11 Almost any product that poses some threat to public
12 health or public morals might reasonably be characterized by a
13 state legislature as related to vice activity. Such
14 characterization, however, is anomalous when applied to products
15 such as alcoholic beverages, lottery tickets, or playing cards
16 that may be lawfully purchased on the open market.

17 The recognition of such an exception would also have
18 the unfortunate consequence of either allowing state legislatures
19 to justify censorship by the simple expedient of placing the vice
20 label on selected lawful activities or requiring the federal
21 courts to establish a federal common law of vice.

22 For these reasons, a vice label that is unaccompanied
23 by a corresponding prohibition against the commercial behavior at
24 issue fails to provide a principal justification for the
25 regulation of commercial speech about that activity.

26 In other words, if you're not banning the activity, you
27 can't try to get at something you don't like by banning
28 commercial speech about that activity.

1 Now, the one thing that's left open, as you may know,
2 the law on lottery type activities, including casino gaming, is
3 sort of a pastiche, and there has been a great deal of litigation
4 over the past few years with regard to the advertising of casino
5 gaming.

6 At the moment, in the Ninth Circuit, which is the
7 western states, because of a case called Valley Broadcasting v.
8 FCC in which the Ninth Circuit held that the federal prohibition
9 on running casino gaming ads was unconstitutional and the
10 Supreme Court denied cert., you can advertise casino gaming
11 assuming that it's okay to do that under state law in the western
12 states and Hawaii.

13 In New Jersey, you can advertise casino gaming on
14 broadcast properties because of a case called Players
15 International v. FCC, which is now on appeal to the Third
16 Circuit.

17 In the rest of the country, you cannot advertise casino
18 gaming, and there is a new case going up to the Supreme Court
19 called Greater New Orleans Broadcasting Association v. FCC and
20 USA, in which the Fifth Circuit Court in New Orleans held that
21 the statutes were a ban against advertising was constitutional.
22 The Supreme Court has granted cert. in that case.

23 The proponents of permitting the advertising have filed
24 their briefs. The government files a reply brief on March 24th.
25 There's a response to that due on April 12th, and the Supreme
26 Court will hear argument on the 27th of April, and we'll have a
27 decision this year.

28 It is our expectation that the Court will find that the
29 statute is unconstitutional because it would be very inconsistent

1 for it to do that, given what it said in its earlier cases,
2 particularly in 44 Liquor Mart.

3 With that, I'm done. Thank you.

4 CHAIRPERSON JAMES: Thank you.