CHAIRPERSON JAMES: Steve.
MR. BOOKSHESTER: Thank you.

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

COMMISSIONER WILHELM: A great lady.
MR. BOOKSHESTER: Yes, indeed.

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

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

Secondly, we might note that we caucused in your break and decided that all of us attorneys -- none of us were experts on the speech rights of states. The regulation runs against us, the federal statutory regulation now. We’re not permitted to broadcast or print in newspapers. So those are First Amendment issues, the issues of the state right to speak, although we
hypothesize that they’re substantial, while not as great as that of individuals or corporations. It’s one that we’re really not expert on.

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

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

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

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

COMMISSIONER BIBLE: Applicability of the First Amendment to --

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

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

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

COMMISSIONER WILHELM: Yeah.
MR. BOOKSHESTER: And our answer is, you know, probably not, but we don’t know, and so we will do our best to bring something back to you.

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

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

COMMISSIONER WILHELM: Thank you.

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

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

The current state of the law, as you know, is defined by the explications of the Central Hudson case. As worked out in the 44 Liquor Mart v. Rhode Island Supreme Court decision of 1996, if a product is legal, as indeed gaming is and as indeed lotteries are, then for the state to regulate, the state/federal government needs to have a substantial interest in regulating speech. That regulation must directly advance the state’s interest to a material degree, and it can’t just be hypothesized. It has to be proven.
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The burden is on the state to prove it. The ban must be no more extensive than necessary to serve the state’s objectives. There must be a reasonable fit between the regulatory purpose and the goal, and mere legislative judgment is not acceptable.

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

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

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

That created what many thought was a vice exception in commercial speech law, which has clearly been eliminated if ever it existed by the Supreme Court’s decision in 44 Liquor Mart. In 44 Liquor Mart, decided in 1996, nine Supreme Court Justices
adhered to the view that there was no vice exception; there is no vice exception, however you may choose to define "vice." There is no vice exemption under the First Amendment for commercial speech; that if the activity that’s being advertised is legal, the state cannot choose to ban the advertising for the activity.

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

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

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

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

In other words, if you’re not banning the activity, you can’t try to get at something you don’t like by banning commercial speech about that activity.
Now, the one thing that’s left open, as you may know, the law on lottery type activities, including casino gaming, is sort of a pastiche, and there has been a great deal of litigation over the past few years with regard to the advertising of casino gaming.

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

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

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

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

It is our expectation that the Court will find that the statute is unconstitutional because it would be very inconsistent
for it to do that, given what it said in its earlier cases,
particularly in 44 Liquor Mart.

With that, I’m done. Thank you.

CHAIRPERSON JAMES: Thank you.