

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1903

TITLE POSADAS de PUERTO RICO ASSOCIATES, dba CONDADO
HOLIDAY INN, Appellant v. TOURISM COMPANY OF PUERTO RICO

PLACE Washington, D. C.

DATE April 28, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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POSADAS de PUERTO RICO ASSOCIATES, :

dba CONDADO HOLIDAY INN, :

Appellant :

v. : No. 84-1903

TOURISM COMPANY OF PUERTO RICO :

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Washington, D.C.

Monday, April 28, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 o'clock a.m.

APPEARANCES:

MS. MARIA MILAGROS SOTO, ESQ., Hato Rey, P.R.;

on behalf of Appellant.

LINO J. SALDANA, ESQ., Santurce, P.R., on

behalf of Appellee.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: The Court will hear
3 arguments first this morning in Puerto Rico Associates
4 against Tourism Company of Puerto Rico.

5 Ms. Soto, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF MS. MARIA MILAGROS SOTO, ESQ.

8 ON BEHALF OF APPELLANT

9 MS. SOTO: Mr. Chief Justice, may it please
10 the Court:

11 This case presents a substantial question
12 whether a statute of Puerto Rico violates the First,
13 Fifth and Fourteenth Amendments of the United States
14 Constitution because it completely bans a franchise
15 holder, a casino franchise holder, from advertising or
16 otherwise offering its casino facilities to the public
17 of Puerto Rico.

18 Without abandoning our Fifth and Fourteenth
19 Amendment attacks on Section 8 of the Games of Chance
20 Act of Puerto Rico, we have chosen to limit our argument
21 to the First Amendment protection extended to truthful
22 information about legal activities, and rely on our
23 briefs for the remaining valid grounds, although in our
24 minds, after living through the over-extensive
25 obligation that Puerto Rico has given to the statute, we

1 cannot characterize this ban as strictly commercial
2 speech. The over-breadth and vagueness of the ban
3 abridges, has abridged in the past, as the record shows,
4 fully protected speech and public debate speech.

5 Neither can we accept as valid the
6 classification, subclassification, of a casino speech
7 ban versus the public forum availability open to other
8 gaining activities in Puerto Rico, nor the resident
9 versus nonresident classification that the judgment
10 below added to the original controversy.

11 However, argument on the First Amendment
12 content based classification of the Act should persuade
13 the Court to hold that casino advertising is protected
14 by the United States Constitution, and that all truthful
15 information about this legal activity cannot be blocked
16 by Puerto Rico in an effort to keep its people
17 uninformed as an extensive means of controlling through
18 speech the activity of gambling.

19 The best example of the dangers inherent in
20 over-broad prohibitions of speech, containing no
21 guidelines of enforcement for the government, are given
22 by the facts of this case. Section 8 of the statute
23 reads: "No gambling room shall be permitted to
24 advertise or otherwise offer its facilities in any
25 manner whatsoever to the public in Puerto Rico."

1 In 30 years of enforcement, the government
2 never defined what constituted advertising, nor who was
3 the public. Neither did it clarify whether in Puerto
4 Rico, including the tourist ones, he or she landed in
5 Puerto Rico.

6 QUESTION: Ms. Soto, didn't the Superior Court
7 Judge substantially restrict the literal language of the
8 statute when he interpreted it?

9 MS. SOTO: Yes, it did, Your Honor, but it did
10 not cure the unconstitutionality of the statute as we
11 would argue.

12 QUESTION: Well, what's left of the statute
13 now? Is it just the prohibition against advertising in
14 the media within Puerto Rico itself?

15 MS. SOTO: The statute as construed still
16 prohibits completely all information if it's addressed
17 to the residents of Puerto Rico. And therefore, it is
18 still a complete ban of truthful information about a
19 legal business to the residents of Puerto Rico, and thus
20 unconstitutional, in our view, as construed.

21 QUESTION: Well, is it media advertising that
22 it now covers, as the court below has construed it?

23 MS. SOTO: Well, Your Honor --

24 QUESTION: What if a matchbook with the name
25 of the casino came into the hands of a resident of

1 Puerto Rico. Is that somehow prohibited now? Is that
2 your understanding?

3 MS. SOTO: According to what the Judge
4 decided, if it was aimed at the tourists it would not be
5 prohibited. The problem is that the determination as to
6 what the intent is would have to be based on content.

7 Each time that an advertisement or information
8 about a casino is -- comes across, and for instance, we
9 brought to this Court's attention a case whereby even
10 under the Court's construction now, as recently as after
11 this Court had granted jurisdiction to hear this case, a
12 supplement was published with information about the
13 casino activities upon the opening of the second hotel,
14 the El San Juan Hotel, that merely covered the
15 facilities that were open to the public.

16 One page out of 52 that cover all the other
17 facilities of the hotel was conceded by the government
18 as casino advertising, and something that they had not
19 done before. They did not fine us this time, but they
20 said that the case was being turned over for
21 investigation for criminal prosecution.

22 Now, this statute is a criminal statute and
23 this was a supplement by -- an article by the newspaper
24 was not an ad placed, as the Judge directed, and still
25 it's being considered as advertising to Puerto Rico. So

1 an example that we still have the same problem.

2 QUESTION: Isn't your First Amendment argument
3 the same, though, whether the statute distinguishes
4 between ads aimed at tourists and ads aimed at Puerto
5 Ricans? I mean, if the -- suppose the statute forbade
6 all ads about the casinos.

7 MS. SOTO: That's what it does. We understand
8 that --

9 QUESTION: Well, it doesn't ban ads aimed at
10 tourists?

11 MS. SOTO: As the Court rewrote it, which we
12 understand is what the Court did, and it is
13 impermissible in our view. It would establish a
14 classification then that I think is also impermissible,
15 of residents versus nonresidents, yes.

16 QUESTION: While I have you interrupted, your
17 general submission is that the First Amendment requires
18 -- or forbids stopping any ads about any legal business?

19 MS. SOTO: If it's an absolute ban and it
20 leaves no channels open of communications to the
21 residents of Puerto Rico in this case, and the activity
22 is legal, we understand that unless there is a
23 substantial interest by the government, which has not
24 been proven in this case, it is unconstitutional, yes.

25 QUESTION: Well, what if -- would you say it

1 would be unconstitutional for Puerto Rico to say, "Well,
2 if you want to advertise casinos, be sure at the bottom
3 say, this may be dangerous to your pocketbook"?

4 MS. SOTO: We have no quarrel whatsoever,
5 Justice White, on having more speech on it if we have
6 to, rather than silencing and keeping the people
7 uninformed altogether as a means.

8 QUESTION: Under your argument would it be
9 unconstitutional if Congress forbade all advertising of
10 cigarettes?

11 MS. SOTO: In the case of cigarettes, I find a
12 substantial distinction in that cigarettes --

13 QUESTION: It's not illegal to smoke.

14 MS. SOTO: It is not illegal to smoke.

15 QUESTION: It's not illegal to manufacture
16 cigarettes.

17 MS. SOTO: That is correct, Your Honor.
18 However --

19 QUESTION: Why would a -- why, under your
20 argument, would a complete ban on cigarette advertising
21 be bad or good?

22 MS. SOTO: I haven't said that it's good. I
23 think it probably would pass constitutional muster if --

24 QUESTION: Why? Why?

25 MS. SOTO: Well, first of all it is harmful to

1 your health according to studies. In the case of
2 gaming, gaming is a social entertainment and there is no
3 link whatsoever that it causes a deleterious effect in
4 older people. It may cause, if some people gamble
5 excessively --

6 QUESTION: Don't you think that Puerto Rico
7 could prohibit gambling altogether and make it illegal
8 because Puerto Rico could determine that it's bad for
9 the citizens?

10 MS. SOTO: Yes, I do, Your Honor, Justice
11 O'Connor. I think they can prohibit it together. But
12 having legalized it, and having other means available
13 already in the Act that are affected, I don't think they
14 can --

15 QUESTION: Well --

16 MS. SOTO: Through speech, control it.

17 QUESTION: Well, suppose you have a state like
18 Alaska that has legalized the use of marijuana, personal
19 use of marijuana. Do you think Alaska can prohibit all
20 advertising of marijuana?

21 MS. SOTO: I think once having legalized it --
22 I am not familiar with the case of the marijuana statute
23 in Alaska, but once having legalized it, I think it can
24 be restricted through a means and manners restriction.
25 I think it can be added more speech as to what effects

1 -- so as to keep the people educated, how they should
2 not be using it. But I don't think they should be able
3 to prohibit it altogether either, no.

4 QUESTION: So, it would be unconstitutional
5 then to forbid ads about cigarettes, smoking, as long as
6 smoking is legal?

7 MS. SOTO: As long as smoking is legal. Or,
8 my position is, since it is inherently dangerous to
9 health, it might be possible to ban it.

10 QUESTION: What about marijuana?

11 MS. SOTO: That would be the same thing with
12 marijuana in that case, then. We can make that
13 analogy. But, it's not the same thing with gambling.
14 And, that is our proposition. Gambling has not been
15 proven to be deleterious per se, because it's not
16 inherently dangerous.

17 It is simply a leisure entertainment activity
18 for most of the people. It's social, fun, thing to do,
19 and to some people it may be, if it's excessive, cause
20 some harm but that is not the general proposition here.

21 And if we extend now -- I mean, so many other
22 things could be harmful. There are so many carcinogenic
23 things now, that causes cancer. Should they all be
24 prohibited, then?

25 I think that in the absence of a substantial

1 interest, ban on speech is not the narrowest means to
2 obtain that end.

3 QUESTION: May I ask this question,
4 publications in the United States magazines and
5 newspapers do circulate in Puerto Rico, don't they?

6 MS. SOTO: Yes, they do.

7 QUESTION: New York Times, Time, Newsweek and
8 so forth?

9 MS. SOTO: Yes.

10 QUESTION: Does the statute ban -- would the
11 statute ban your casino from advertising in those
12 publications?

13 MS. SOTO: The statute did ban all kinds of
14 media. The way it was construed by the Court, it would
15 allow, if it's published in the States and it comes
16 through into Puerto Rico -- as construed by the judicial
17 branch.

18 QUESTION: Under the construction of the
19 Superior Court, your client could run items in
20 publications in the United States if it's circulated in
21 Puerto Rico?

22 MS. SOTO: Yes, under the construction of the
23 Court, yes.

24 QUESTION: In other words, if the ban is
25 limited to local media?

1 MS. SOTO: Correct, under the construction.

2 Now, the facts of this case are clearly -- I'm
3 familiar with it, but to go briefly through them,
4 Posadas was fined for the first time when a supplement
5 was published in the San Juan Star, an article about
6 annexing the Laguna Wing to its already facilities, and
7 there was an ad placed by our union, our casino union,
8 that contained no message about promoting the casino,
9 but that included the word "casino" as its trade name
10 and a little drawing about a roulette in the background.

11 Tourism understood that was casino
12 advertising, and it warned -- Tourism warned Posadas
13 that it was violating the law. Because it did not get a
14 reply from Posadas, a fine was imposed on the company.

15 This interpretation was immediately challenged
16 by Posadas, but while a ruling was pending the gaming
17 director wrote a letter to the president, then, that was
18 stationed in Missouri, informing about the violations in
19 the operations in Puerto Rico. The president was quick
20 to answer, but used stationery that had the word
21 "casino" on it, and since the government understood that
22 the word "casino" on letterhead is also advertising, a
23 second fine was imposed on Posadas.

24 The third fine was imposed after the ruling
25 came out and the ruling was upholding an absolute ban on

1 speech, and because one of the guests that was staying
2 in the hotel had a brochure that was left in his room
3 and was handing it at the lobby, which was a public
4 facility, to the government inspector, and they thought
5 that was casino advertising also, and there was a third
6 fine that was imposed on Posadas.

7 And the fourth fine really was a public debate
8 issue where the president was holding a press conference
9 and photographic session to protest legislation that
10 proposed to ban the slot machines from Puerto Rico.

11 QUESTION: Ms. Soto, were all four of these
12 instances after the Superior Court Judge issued his
13 ruling?

14 MS. SOTO: Yes, Your Honor, they were all
15 there.

16 QUESTION: And are they all, in the views of
17 your opponent, so far as you know, consistent with the
18 Superior Court's Judge's ruling?

19 MS. SOTO: Yes. As a result of these four
20 fines, Posadas' reputation was tainted to the extreme
21 that our system operation in Atlantic City was
22 recommended denial of a casino license because the new
23 Gaming Enforcement Division of our jurisdiction
24 understood that Posadas was an unsuitable operator.

25 At that point, declaratory judgment was

1 sought, at that initial stage, on Paragraph 9 of the
2 complaint, that three challenges to the First,
3 Fourteenth Amendment, and due process were brought up at
4 that initial level.

5 In the case of the due process we did not
6 specify whether it was the Fifth or the Fourteenth
7 Amendment because as we understand it, this Court has
8 now decided which of the two due processes are
9 applicable to Puerto Rico, as declined in the
10 Calero-Toledo case.

11 QUESTION: Ms. Soto, I thought the fines were
12 imposed before the Superior Court made its final
13 interpretation of the statute?

14 MS. SOTO: That is correct. Before that --

15 QUESTION: You just told Justice Rehnquist it
16 was after.

17 MS. SOTO: Oh, I'm sorry. I misunderstood
18 you, then. No, no. The fines were imposed before. I
19 thought he said --

20 QUESTION: It was my understanding that the
21 determination of the Superior Court when it in effect
22 rewrote the statute, if that's what it did, that the
23 Judge did that after all these fines he did impose?

24 MS. SOTO: Yes. These four fines, and the
25 fact that we were almost denied a hotel license, was

1 before the final --

2 QUESTION: Well, then, why shouldn't we
3 proceed with the argument over what's left of the
4 statute, rather than what happened before?

5 MS. SOTO: These were the facts that brought
6 the case up. We continued then -- we have to -- as a
7 basic proposition, we think that by the Court rewriting
8 the statute it has invaded legislative functions, and
9 our main recommendation is that this statute --

10 QUESTION: Well, didn't --

11 MS. SOTO: -- as it was is the one that should
12 be construed by this Court.

13 QUESTION: But, aren't we bound by the
14 interpretation of the statute by the courts in Puerto
15 Rico?

16 MS. SOTO: I don't think that has been
17 decided, Justice O'Connor. I think if this Court agrees
18 to extend to Puerto Rico the protections as if it were a
19 state, which I think it's undecided up to this point --

20 QUESTION: If the action came from a state,
21 would we not consider as binding the interpretation of
22 the statute by the court below?

23 MS. SOTO: I think you would in matters of
24 local law. However, even --

25 QUESTION: Would the state cross-appeal, or

1 make a cross-filing here about the court's
2 interpretation?

3 MS. SOTO: No.

4 QUESTION: No, so don't we -- shouldn't we
5 just follow the ruling of the court below as a matter of
6 local law?

7 MS. SOTO: I don't think so, Your Honor,
8 because the state deference will not preclude the Court
9 -- this Court's role as the final arbiter of the Federal
10 Constitution, when it means the invalidation of a
11 statute.

12 QUESTION: But all Justice O'Connor is asking
13 about is the matter of how the statute is intended to
14 read. We have to take the word of the Superior Court.

15 MS. SOTO: Not if it clashes with the
16 Constitution of the United States.

17 QUESTION: No, no, but as to how broadly the
18 statute sweeps. There, we would defer to the Superior
19 Court, would we not?

20 MS. SOTO: If this Court decides to defer,
21 yes. I just bring the proposition because I don't think
22 that has been decided yet, so the proposition was that
23 in one case you would go and interpret it directly,
24 yourselves, you do give it state -- status, as is, it's
25 still unconstitutional..

1 QUESTION: May I ask you a question at this
2 point. Is it correct that even after the judge rewrote
3 the statute, it still prohibits the use of the word
4 "casino"? The statute as reconstrued by the judge still
5 prohibits the use of the word "casino"?

6 MS. SOTO: If it's addressed to the residents
7 of Puerto Rico, everything that has to do with a casino
8 is still prohibited. They have allowed the word of
9 "casino" in a trade name of --

10 QUESTION: One of the incidents was being
11 fined, as I understand it, for this press conference
12 with the black ribbon across the slot machines and so
13 forth, and the word "casino" appeared in the story.
14 Would that fine have been imposed under the statute as
15 reconstrued, or --

16 MS. SOTO: I think so, because that's
17 precisely why I brought the example of a recent case
18 that happened just this December. That was after the
19 statute was construed, whereby under this interpretation
20 and even after this Court had granted jurisdiction, or
21 construed jurisdiction at least until the merits -- they
22 are still construing the statute that if it's addressed
23 to the public of Puerto Rico it's prohibited, and here
24 we are talking about a supplement that was in English.

25 Here we have a market that, although Puerto

1 Rico is a secondary market, but we have only about a
2 fifth of the tourists that come to Puerto Rico staying
3 in hotels, and of those that stay in hotels only 60 to
4 70 percent stay in hotels with casinos.

5 So, our market out there in Puerto Rico, of
6 the tourists, is large, and how are we going to be able
7 to juggle, how to get to the tourists without getting to
8 the residents? And then, it's going to be an intent of
9 whether, is it intended to the residents? Here is an
10 English supplement, and we are being investigated for
11 criminal prosecution this time, not only a fine.

12 On the jurisdictional question which this
13 Court would have me address, a facial attack on Section
14 8 was properly raised at every level of the proceeding,
15 initially in the complaint, Paragraph 9 as stated, and
16 throughout in the Notice of Appeal, Motion for
17 Rehearing, and the Court acknowledged that in his own
18 opinion when he said that the First, Fifth and
19 Fourteenth Amendments were applicable to the question at
20 bar.

21 And, there are no independent state grounds
22 for dismissal, expressed, at least on the merits -- on
23 the face of the judgment below, but rather that the
24 Court dismissed the case for lack of a substantial
25 question, which is a decision on the merits and

1 therefore the decision is final and properly appealable
2 to this Court.

3 Due to the time limitations we will rest on
4 our briefs, on the rest of the jurisdictional questions,
5 unless there is some concern of this Court, and we will
6 move on to the substantiality of the question, which we
7 think is very substantial as it abridges, first,
8 commercial speech rights, it establishes a
9 subclassification of casinos versus other legalized
10 gaming.

11 The classification is more suspect because it
12 is a content based classification on speech, and it has
13 raised now that the opinion below has come out of a
14 second classification of residents versus non-residents,
15 in addition of intruding into core speech rights because
16 of its overbreadth and vagueness, violated due process
17 guarantees.

18 The judgment below did not put to rest the
19 issues. Therefore, we have to look into the merits of
20 the ban itself and whether the government has met the
21 burden that at least the Central Hudson test has imposed
22 when abridgement of first commercial speech rights are
23 involved.

24 The activity is constitutionally protected
25 because gaming has been legal in Puerto Rico since 1948,

1 and there is no suggestion on the record that the
2 information given is false or misleading.

3 Whether the government has had a substantial
4 interest is kind of vague, because the government has
5 advanced five substantial interests up to this point,
6 two in the original complaint which was that the
7 tourists would be protected from the patronizing of the
8 residents of the casino, which we fail to see how that
9 could be, and also that the Puerto Rico residents would
10 not promote tourism and do not contribute revenues to
11 our economy, which is also not a serious argument, I
12 don't think. Then, we would say that income tax from
13 state residents are not income to the Treasury.

14 In its Motion to Affirm, it added that the
15 government interest was to discourage the games of
16 chance so that the Puerto Rican would earn his bread
17 with the sweat of his brow, but that doesn't seem to be
18 a substantial interest on the face that the government
19 itself runs the state lottery, advertises it, allows it,
20 very permissive with horse tracks. It's very permissive
21 with cockfights, all of which are highly patronized by
22 the Puerto Ricans, while the casinos are not.

23 This Court's level -- for the first time, a
24 tourism company brings, a casino information has no
25 value in our free market society which is contrary to

1 the Virginia holding and the progeny cases that follow,
2 and that advertising will lead to excessive casino
3 gambling with no factual basis at all on the record.

4 These changes in substantial government really
5 brings out the fact that it seems that the government is
6 really fishing for a substantial interest that will
7 uphold its own dislike of speech about gaming. But the
8 true government goal, as read from Section 8, is a guard
9 on a legal speaker and the election of public ignorance
10 as a means of controlling legalized gambling.

11 While the government has in the Act means that
12 directly advance, such as minimum and maximum limits,
13 strict supervision on a daily basis, no on-premise
14 alcohol consumption, no minors allowed, a slot foreman
15 to avoid slot houses, criminal sanctions for violating
16 the law, credit procedures and controls, surveillance,
17 and now IRS reporting on the Bank Secrecy Act.

18 Other non-speech related controls and
19 affirmative speech programs as suggested by Justice
20 White may be adopted by Puerto Rico. That would
21 directly advance these roles which we are not
22 challenging. We do not mind the strict regulation of
23 gaming. We just don't think that speech is the proper
24 way of doing that, without unduly burdening the
25 franchise holder entitled to conduct its business by the

1 government inducing it for its own economic benefit.

2 What Puerto Rico cannot do is deter gaming by
3 blocking information about gaming in any manner, if
4 addressed to the resident, because it is not the least
5 restrictive means tailored to that end. The government
6 has not met its burden, not a trial, not an argument
7 which is really not evidence that would substitute trial
8 evidence, for a departure from this Court's precedent on
9 commercial speech.

10 It merely relies on the word of Section 8,
11 while we introduce at least the only study that has ever
12 been made on gaming in Puerto Rico, it's in your brief,
13 and which proves that just the opposite, as soon as
14 gaming was regulated in Puerto Rico the former
15 patronizing of the people of Puerto Rico of illegal
16 casinos, which was 100 percent doing that, lost to five
17 percent, because of the highly regulated nature of the
18 gaming activity itself which is what we advanced.

19 There is no substantial evidentiary ground for
20 Tourism to request, or the government, that this
21 activity be placed outside of the umbrella of the
22 Constitution, together with illegal activities and
23 together with child pornography and obscenity, because
24 it's none of that. Gaming is legal in Puerto Rico, and
25 there is no reason why this Court should backstep 11

1 years to the Bigelow versus Virginia era when truthful
2 information about legal activity was totally suppressed,
3 or was able to be totally possessed.

4 As a matter of principle, a prophylactic ban
5 on protected speech must withstand at least the
6 intermediate scrutiny of Central Hudson which we just
7 went through, although we prefer the view of the
8 construction that the Constitution has made the choice
9 of keeping the people of the United States informed as
10 long as we are a free enterprise democracy, and Section
11 8 does not meet this test.

12 We would like to keep the remaining time for
13 rebuttal.

14 QUESTION: Ms. Soto, before you sit down, of
15 no importance but is this the old Condado Beach Hotel or
16 a new one?

17 MS. SOTO: No, it's a different one, Your
18 Honor. It's the old San Geronimo Hotel. It's not the
19 Condado Beach.

20 QUESTION: Thank you.

21 CHIEF JUSTICE BURGER: Mr. Saldana.

22 ORAL ARGUMENT OF LINO J. SALDANA, ESQ.

23 ON BEHALF OF THE APPELLEE

24 MR SALDANA: Mr. Chief Justice, and may it
25 please the Court:

1 The main issue here is the validity of a
2 statute that restricts the advertising of casino
3 gambling in Puerto Rico, and the first question that we
4 must address is the scope of the restriction. Now,
5 appellant is attacking here before this Court the
6 statute, the 23-word statute, not the statute as it was
7 interpreted by the Superior Court.

8 And, of course, that is the wrong approach
9 because what the statute means must be determined by
10 what the Superior Court decided that it means, and that
11 interpretation is binding upon this Court as it has been
12 decided by many, many precedents applicable to states,
13 which are perfectly applicable to the Puerto Rico
14 Supreme Court -- or the Commonwealth Court --

15 QUESTION: Mr. Saldana, what do you say is
16 left of the statute? Exactly what conduct, in your
17 view, does it now prohibit as interpreted by the
18 Superior Court?

19 MR SALDANA: That is the question, precise
20 question, that must be addressed in the first instance.
21 And what is left may be described as follows: the
22 Superior Court said that no advertisements of casinos
23 addressed to residents of Puerto Rico would be allowed
24 in general, when published in the local media.

25 But then, it went on to make a series of

1 exceptions, even to that general rule. It excepted, for
2 example, advertisements which were distributed to
3 residents if residents are clients of the hotel, not
4 even guests, but clients, just people who are in the
5 hotel premises.

6 So, if residents are in the hotel premises,
7 there is no restriction at all.

8 QUESTION: But may I ask you, just on that
9 right now.

10 MR SALDANA: Yes.

11 QUESTION: Supposing -- could they advertise
12 in a local newspaper?

13 MR. SALDANA: They could, yes, Your Honr..

14 QUESTION: They could?

15 MR SALDANA: They could, provided the
16 advertisement is not addressed to residents. If the
17 advertisement is addressed to --

18 QUESTION: But if the newspaper -- supposing
19 you have a newspaper of general circulation in San
20 Juan. I don't really know -- and 95 percent of the
21 people who subscribe to it are local residents, if they
22 put just a big ad in there, come to the casino at such
23 and such hours, would that be permitted under the
24 statute? Ninety-five percent of the subscribers are
25 local residents.

1 MR SALDANA: I would say that if in the
2 advertisement, Your Honor, it is stated that this
3 advertisement is addressed to tourists and not to
4 residents, that that leaves it permissible.

5 QUESTION: Even though 99 percent of the
6 people who buy the newspaper are really not tourists,
7 it's still all right as long as they put in the ad,
8 "Nobody but tourists should read this ad"?

9 MR SALDANA: Well, nobody but tourists are
10 invited to visit the casino. Because, that is what the
11 court is prohibiting. The court is prohibiting a casino
12 from advertising to entice residents to visit and gamble
13 at its casino.

14 QUESTION: But they don't prohibit them? The
15 local residents can go if they want to?

16 MR SALDANA: Oh, yes, sir. There is no --

17 QUESTION: Well, what does the advertisement
18 say, "You legally can go but we don't want you"?

19 [Laughter.]

20 MR SALDANA: No, they are saying, you legally
21 can go but the demand for gambling among residents
22 should not be stimulated artificially, should not be
23 increased by advertisements from casinos.

24 Now, in other jurisdictions, in the Bahamas,
25 in Aruba and Monaco, the laws prohibit residents from

1 going to the casino, as Your Honor has suggested that
2 Puerto Rico may have done. In England, for example, it
3 is not prohibited but advertising to local residents is
4 prohibited.

5 Now, the advertisement -- the prohibition of
6 local residents, the prohibition to visit or to gamble
7 at local casinos is perfectly unworkable, Your Honor.
8 That is why it is not prohibited in Puerto Rico, because
9 there are no means of identifying who is a tourist once
10 they come into the casino, and who is a resident.

11 QUESTION: Well, in some places it is. In
12 some places you have to show a passport.

13 MR SALDANA: Yes, but there is no tourist --

14 QUESTION: You don't need a passport?

15 MR SALDANA: Normally don't need passports in
16 Puerto Rico, and we don't have any ID cards issued by
17 the government.

18 QUESTION: There's no law that prohibits local
19 persons from gambling in a casino in Puerto Rico?

20 MR SALDANA: That is true.

21 QUESTION: It's just as legal as going to
22 church?

23 MR SALDANA: Yes.

24 QUESTION: Mr. Saldana, what is this most
25 recent criminal investigation that's going on concerning

1 the Posadas that has arisen since the Superior Court
2 interpretation?

3 MR SALDANA: It does not concern Posadas at
4 all. It concerns another casino that is owned by
5 another company, which is related to Posadas. Posadas --

6 QUESTION: All right, and for what activity is
7 it?

8 MR SALDANA: The advertising appeared in a
9 newspaper when the New San Juan Hotel was opened, and
10 the New San Juan Hotel has a casino and they published a
11 35-page supplement in a newspaper about the wonderful
12 new casino and all of its facilities, and one of the
13 pages was an advertisement describing in detail the
14 gaming facilities, how many tables, gaming tables they
15 were, what the roulettes were, what the card games
16 available there were, and that it was the best casino in
17 all the world.

18 And then, they published a picture --

19 QUESTION: And would it have been all right if
20 they had added in it that local residents shouldn't read
21 it? Then it would have been all right, in your view?

22 MR SALDANA: In my view, if that advertisement
23 had been addressed to tourists exclusively, there would
24 be no prohibition. But the point is that it was not so
25 limited. The advertisement was addressed to everybody.

1 Now, the Court in its interpretation not only
2 permitted advertising to residents if they are within
3 the hotel premises, but permitted advertising to
4 residents by all sorts of souvenirs, match boxes, and
5 other such devices, publicity devices, that freely
6 circulate between residents or among residents.

7 The Court also permitted advertisements in
8 local magazines which are for -- mainly for distribution
9 to tourists, but if -- the Court said they reach the
10 hands of residents, that doesn't make them legal.

11 Then it excluded completely all advertising
12 outside the jurisdiction of Puerto Rico. That is --
13 referring now to the question that was put by Mr.
14 Justice Powell a while ago, advertising that is
15 published in the New York Times which circulates in
16 Puerto Rico every day, we buy it every day and we read
17 it and a lot of persons read it.

18 Not only in that -- that was just an example,
19 but in any magazine like Time Magazine or Newsweek or
20 any other magazine in the United States.

21 QUESTION: I suppose that would be rather
22 expensive advertising for one community to have to
23 advertise in a national publication in order to
24 distribute locally, wouldn't it?

25 MR SALDANA: Well, it is a restriction, Your

1 Honor. There is no -- but the advertising is not
2 restricted, outside of the United States is not
3 restricted to national advertising.

4 It may be a paper or a magazine, and there are
5 many of them, that are published mainly for Puerto
6 Ricans in New York or Puerto Ricans in the States, the
7 Puerto Rican communities in the States, and these papers
8 and magazines circulate in Puerto Rico. They are even
9 printed in Spanish, too.

10 Well, those advertisements are excluded,
11 which--

12 QUESTION: Would you say the average tourist
13 in Puerto Rico knew there was gambling, before he went?

14 MR. SALDANA: No, no, sir. I don't think so.
15 There are many tourists --

16 QUESTION: Isn't that the reason he went, for
17 the average tourist?

18 MR SALDANA: There are many tourists that come
19 to Puerto Rico who are not informed, other than maybe in
20 a very general way --

21 QUESTION: Two or three.

22 MR SALDANA: Yeah, but -- no, I don't think so.

23 Your Honor may be thinking that most tourists
24 come to Puerto Rico to gamble, and I would seriously
25 doubt that that is so. The --

1 QUESTION: How many tourists from the Virgin
2 Islands go to Puerto Rico, other than to gamble?

3 MR SALDANA: I have no idea, Your Honor.

4 QUESTION: Just guess.

5 MR SALDANA: I know that the hotels in Puerto
6 Rico, there are 13 gambling casinos, ten of them in the
7 San Juan area, and three of them outside. And they make
8 quite a publicity among tourists and they make quite
9 publicity in the Virgin Islands, so that they may be
10 enticing them to come to San Juan. I agree with Your
11 Honor.

12 But, the point is that this is no absolute and
13 complete ban. It's -- if you take the Court's -- the
14 Superior Court's interpretation, how can you say that it
15 is an absolute ban? It's very relative ban of
16 advertising, is very limited. It concerns only
17 residents and only to residents, to local medias.

18 And, there is also a very general rule
19 interpretation made by the Superior Court, it's an
20 important aspect, is that if there is any doubt as to
21 whether an advertisement is addressed to a tourist or is
22 addressed to a resident, then it is permissible because
23 the court stated that the general rule would be that the
24 advertising which is addressed to tourists is completely
25 exempt from the prohibition.

1 And therefore, I submit that this is no
2 absolute ban, and that's what is before this Court.

3 QUESTION: Mr. Saldana, let me ask you a
4 question about procedure in Puerto Rico. As I
5 understand it, the Supreme Court of Puerto Rico entered
6 an order which did two things. It said that the appeal
7 did not present a substantial constitutional question,
8 and therefore dismissed the appeal.

9 MR SALDANA: Yes, sir.

10 QUESTION: And secondly, it said, considering
11 the writ filed as a revision, it is denied. Now, is the
12 writ that was denied something like our certiorari
13 practice where they have discretion to grant or deny the
14 writ?

15 MR SALDANA: Yes, Your Honor.

16 QUESTION: So, to what extent, then, have they
17 -- is there a precedent? Have they adopted the
18 reasoning of the trial court, or is it just -- they just
19 decided not to review the case?

20 MR SALDANA: The rejection of the appeal for
21 lack of a substantial constitutional question is
22 equivalent to an affirmance of the Superior Court --

23 QUESTION: As to being no constitutional
24 violation?

25 MR SALDANA: That is so.

1 QUESTION: But not necessarily an affirmance
2 of its interpretation of the statute, I take it?

3 MR SALDANA: It is an affirmance of the -- it
4 is like an affirmance by this Court of a judgment when
5 the appeal is summarily dismissed.

6 QUESTION: Right. And the judgment in this
7 case granted no relief to the plaintiff, it just had a
8 long opinion reconstruing the statute and ultimately
9 dismissed the complaint, didn't it?

10 MR SALDANA: It ultimately dismissed the
11 complaint, but in its interpretation it went a very long
12 way.

13 QUESTION: Yes, but the judgment of the
14 Supreme Court merely affirmed the judgment, which was
15 dismissing the complaint, is that right or am I wrong?

16 MR SALDANA: Well, it affirms the judgment and
17 the reasoning, and the reasoning is --

18 QUESTION: The reasoning?

19 MR SALDANA: Yes. The problem, Your Honor,
20 with the jurisdictional matter here, which I should
21 perhaps have addressed first, is that this is an appeal
22 that comes from the Supreme Court of Puerto Rico and the
23 validity -- the record shows that the validity of the
24 statute was not challenged at all stages of the
25 proceedings.

1 It was not explicitly challenged, and
2 certainly it wasn't challenged on federal grounds,
3 because the only mention of federal law is the one made
4 before this period, for the appellant -- plaintiff below
5 referred to a claim of right regarding what he called
6 his First Amendment rights. It did not even mention
7 free speech, just First Amendment rights, and he claimed
8 that the administrative interpretation of the law
9 infringed his First Amendment rights.

10 Now, he did mention that there was an equal
11 protection right involved, the equal protection right
12 protected by the United States Constitution. It did not
13 mention any specific clause of the Constitution
14 whatsoever.

15 As to due process, there was no further claim
16 at all in the Superior Court. Then, when we come to the
17 Supreme Court, at the Supreme Court level there was
18 again no specific claim of invalidity of the statute
19 involved, and as to appellant's claims of right, there
20 was no federal equal protection right claimed. There
21 was no federal due process right claimed.

22 And as to the other matter involved, other
23 question tendered here for appeal, the only reference
24 was to right of expression protected by the Bill of
25 Rights.

1 QUESTION: Mr. Saldana, in the Superior
2 Court's opinion, in its Conclusion of Law 13, the
3 Superior Court said that the First, Fifth and Fourteenth
4 Amendments of the Constitution of the United States are
5 applicable to the controversy.

6 Now, if the Superior Court passes on it, the
7 fact that it may not have been properly raised does not
8 defeat maintaining the claim here, I don't think.

9 MR SALDANA: No, Your Honor. But notice, Your
10 Honor, that the Superior Court merely says that it was
11 involved, that these clauses were involved. The
12 Superior Court did not even pass on these matters. And
13 the judgment issued by the Superior Court was merely, we
14 issue now a declaratory judgment concerning the
15 interpretation of this statute, where federal rights are
16 involved.

17 But, the specific challenge to the validity of
18 the statute, to the authority to enact the statute, was
19 never made before the Superior Court and was never made
20 before the Supreme Court either.

21 Now, the Supreme Court appeal, we have argued,
22 was also untimely because it was filed too late, and the
23 reply brief that appellant has filed is very
24 significant, in my judgment. It does not present any
25 rebuttal of the defects that have been pointed out in

1 the appellee's brief.

2 It merely states, as a naked statement, that
3 the appellees' claim was properly presented, and then it
4 goes on to beg the indulgence of this Court, that the
5 appellant was pressed for time, that the appellant
6 decided at the very last moment to file an appeal before
7 the Supreme Court of Puerto Rico, and that that was why
8 it didn't make things -- it didn't do properly the
9 appeal.

10 It didn't raise the constitutional issues as
11 it should have done. But unfortunately for the
12 appellant, as we all know, jurisdictional requirements
13 cannot be dispensed with and cannot be waived. He may
14 have a perfect excuse otherwise for not doing the right
15 things, but if he didn't do it then there is no
16 jurisdiction and that is what we claim.

17 Now, the -- going to the merits, I would like
18 to state in simple terms our position. The main
19 position of the appellees in this case is that First
20 Amendment protection should not be extended under the
21 commercial free speech doctrine to advertising of casino
22 gambling.

23 And the reasons in support of that position
24 are in brief, that gambling and casino gambling is an
25 activity that is harmful to the community, that it is a

1 vice-strewn activity, and that Puerto Rico should have
2 the power to legalize casino gambling if it believes
3 that, for example, it is unwise or impractical to
4 prohibit it altogether because people will gamble
5 anyway, or because it expects to derive some economic
6 benefit from the legalization of casino gambling, but
7 that there should be no requirement that then Puerto
8 Rico should allow casinos, to promote and to actively
9 advertise and market their services and their products
10 so as to create new gamblers.

11 And the same would apply, I would suppose, to
12 the marijuana case that was put by Justice O'Connor,
13 because a state is allowed to legalize marijuana but it
14 is prohibited from telling people, "Don't advertise
15 marijuana," then new persons who consume marijuana will
16 be encouraged to do it.

17 I mean, it's not -- the state will not be able
18 to limit the legalization to what the existing demand
19 for marijuana or gambling or casino gambling is at the
20 time that it is legalized.

21 In our case, the situation is very, very
22 difficult because there's no doubt that casino gambling
23 is a very dangerous activity, that it attracts and has
24 attracted, in Nevada and Atlantic City, it has attracted
25 the crime gamblers. It has attracted organized crime,

1 and provoked a host of other problems concerning law and
2 order including among others the corruption of
3 government officials, as the Abscam investigation showed
4 in Atlantic City where the senior Senator, federal
5 Senator was involved in taking bribes.

6 QUESTION: Mr. Saldana, may I ask you another
7 question about the procedure in this case. The judgment
8 of the trial court ends with the statement, "These
9 guidelines may be amended in the future by the enforcing
10 agency pursuant to the dictates of the changing needs
11 and in accordance with the law and what is resolved
12 herein."

13 And, I would just like to get your views on,
14 how firmly can we rely on what the trial judge has done
15 here as a definite rule for the future, if he says --
16 winds up by saying the enforcing agency can change the
17 rules?

18 MR SALDANA: Well, I interpret that, Your
19 Honor, to mean that the enforcing agency can change --
20 can adopt new rules as to things that are not decided in
21 the opinion, but the Court was not telling the enforcing
22 agency, "You can change my judgment," because they it
23 would be a nullity.

24 QUESTION: But he says, "These guide
25 regulations may be amended in the future."

1 MR SALDANA: Well, yes, I interpret that, that
2 they may be amended to include new things, to make new
3 provisions, but that the judgment it renders, the
4 declaratory judgment, is of course valid and binding
5 between appellant and the tourism company.

6 QUESTION: I see.

7 MR SALDANA: Now, we -- going back to the
8 merits, the issue here is simple in a sense. If Puerto
9 Rico cannot prohibit the marketing and advertising of
10 casino gambling, then it is faced with a tremendous
11 problem because the experience in Nevada and Atlantic
12 City shows that when you open up the floodgates of
13 advertising and promotion, the casinos, the gambling
14 casinos take over.

15 They take over as in Nevada where the
16 principal industry is casino gambling. They take over
17 because they exercise such a tremendous influence.

18 QUESTION: Why not get rid of casino gambling?

19 MR SALDANA: I'm sorry, I --

20 QUESTION: Why not get rid of casino gambling?

21 MR SALDANA: Yes, so that the only alternative
22 would be to get rid of casino gambling, because I
23 believe that Puerto Rico --

24 QUESTION: You'd lose all the taxes, wouldn't
25 you?

1 MR SALDANA: We lose -- we would lose, Your
2 Honor, not only the taxes but the help that casino
3 gambling tourists give to the tourism industry in Puerto
4 Rico. But I believe that it would be preferable, and I
5 believe that Puerto Rico would find it preferable to ban
6 completely casino gambling rather than let them
7 advertise without limit, and let them advertise and
8 market and create new gamblers and create new demand,
9 and follow the pattern and the model of Nevada and
10 Atlantic City where it's an incessant cycle of growth
11 for these people.

12 They grow, they promote an increased level of
13 demand and then they expand and they grow, and then they
14 again promote the demand, and finally what they do is
15 they take over the state. Well, Puerto Rico does not
16 want to be another Nevada or another Atlantic City.

17 So that, if this Court decides that we cannot
18 limit advertising, the only recourse will be to prohibit
19 casino gambling altogether.

20 CHIEF JUSTICE BURGER: Do you have anything
21 further, Ms. Soto?

22 MS. SOTO: Yes, Mr. Chief Justice.

23 ORAL ARGUMENT OF MS. MARIA MILAGROS SOTO, ESQ.

24 ON BEHALF OF APPELLANT -- REBUTTAL

25 MS. SOTO: I would just like to rely on two

1 points made by brother counsel, one on the
2 jurisdictional question. It's completely meritorious,
3 the challenge that the question was not raised properly
4 and that it was a last-minute thought to bring a facial
5 attack.

6 It was brought properly. There are specific
7 references in your record that it was brought in the
8 Complaint, in the Notice of Appeal, in the Motion of
9 Rehearing, plus in the Declaratory Judgment.

10 It particularly reads: "The judgment itself
11 will hereby declare that Section 8 of the law is not
12 conclusive [inaudible] from its face, and is sustained.
13 There was a facial attack right from the very beginning
14 and right on, and the constitutional -- by number,
15 First, Fifth and Fourteenth, recognized by the trial
16 court as being properly raised, with regards to the
17 merits.

18 What is left of the judgment below opinion is
19 unconstitutional, because as Justice Stevens very well
20 brought out, and I have it on my notes, before I
21 couldn't cover it, this opinion is subject to change.
22 And not only is it subject to change, it was going to be
23 changed this year.

24 This very year it was going to be changed by
25 the Tourism Company to include only the paragraph A

1 which is the proscription that Posadas or any other
2 gambling casino would advertise to the public in Puerto
3 Rico, without including all the other exceptions the
4 Board had made, and it can be done at any minute because
5 the Court contemplated the possibility, that if it was
6 regulated, as it was -- certain regulatory functions,
7 they could not take them all together from the Agency
8 and the Agency could change these regulations any time
9 it saw fit.

10 So, therefore, all channels of communications
11 to the residents are still closed, they are foreclosed,
12 and the section in the paragraph -- in the article that
13 was published, which by the way it is the same company
14 that manages both hotels, Posadas Hotels and the El San
15 Juan Hotel, proves that the content of this article is
16 not enticing the people to come and gamble in the
17 casino, and it is not paid publicity, which is what the
18 Judge held.

19 It is an article covering all sorts of things
20 including job opportunities, and the people that we want
21 to employ and where do we recruit them.

22 QUESTION: Yes, but that's not in the record,
23 is it, Ms. Soto? That's not in the record before us, is
24 it?

25 MS. SOTO: Yes, it is, Your Honor.

1 QUESTION: Was that in the --

2 MS. SOTO: It is on the record. It's
3 particularly -- it's Appendix D in our reply brief.

4 QUESTION: It's in your reply brief, but it
5 was not in the record before the trial court because it
6 didn't happen before?

7 MS. SOTO: No, it didn't happen before. It
8 happened after. It was duly authenticated, the
9 signature of the Secretary of Justice through the
10 Department of State, and brought properly under Rule 201.

11 QUESTION: May I ask you just one more
12 question that puzzles me about the -- what is all this
13 business about the use of jackets by men? What was that?

14 MS. SOTO: That was a [inaudible] question
15 that arose while the case was being tried by the judge,
16 whereby they required a jacket to go into the casinos to
17 the men, while they didn't require proper attire for
18 women, and the court found that it was
19 unconstitutional. And since, it has been changed.
20 Regulations have been adopted flexibilizing the dress
21 code.

22 QUESTION: Was that a challenge that you and
23 your client had made against --

24 MS. SOTO: We have made a claim but the court
25 became aware of it, and thought it was unconstitutional

1 and --

2 QUESTION: And just sort of threw it in the --
3 okay.

4 MS. SOTO: The problem -- the problem still
5 exists with the statute as construed, in addition that
6 it can't be changed. It subjects a casino franchise
7 holder to self-censorship all the time, plus when it
8 finally does advertise, that advertisement is going to
9 be judged on content. I think either one [inaudible]
10 violates the Constitution and for such reason, we
11 request that this Court strikes down under Section
12 1258(b) which is properly raised on appeal, this case,
13 the decision below.

14 We feel that Yu Cong Eng rationale, although
15 it is an old case, is still valid. It has been recently
16 and approvingly cited in Matthews versus Heckler whereby
17 this Court entertained directly to evaluate the section
18 challenged and the [inaudible] broken down as we think
19 this one should be.

20 Thank you.

21 CHIEF JUSTICE BURGER: Thank you, Counsel.
22 The case is submitted.

23 [Whereupon, at 10:58 o'clock a.m., the case in
24 the above-entitled matter was submitted.]

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1903 - POSADAS de PUERTO RICO ASSOCIATES, dba CONDADO HOLIDAY INN,

Appellant V. TOURISM COMPANY OF PUERTO RICO

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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